Supreme Court, U.S.
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NO. _____

In The
Supreme Court of The United States
October Term 1995

PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN STEWART and VINCENT GRECO

Petitioners

vs.

CHARLES CHRISTY ,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI OF PETITIONERS PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, VINCENT GRECO, AND JOHN STEWART

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89 pp

QUESTIONS PRESENTED

1. Whether the Third Circuit improperly denied qualified immunity by ruling that it must view the facts in the light most favorable to plaintiff and refusing to consider whether the Petitioners could reasonably have believed their conduct was "objectively reasonable", as required consistently by this Court and by most other Courts of Appeal.

2. Whether, on Petitioners' Eleventh Amendment immunity claim, the Third Circuit improperly adopted for the first time a new standard shifting the burden on summary judgment to the defendants to affirmatively establish their entitlement to immunity, but refused to remand for development of a factual record under the new standard.

LIST OF ALL PARTIES

The Petitioners herein are the Pennsylvania Turnpike Commission, Robert Brady, Vincent Greco, and John Stewart, defendants below.

Additional defendants, not involved in this appeal, are John A. Boschi, James J. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L. DiRienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Kovel, George Pilecki and Sean Pilecki.

The Respondent is Charles Christy, plaintiff below.

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TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

Factual Background 2

Summary Judgment Motions 4

The Decisions Below 5

REASONS FOR GRANTING THE PETITION 8

A. The Analysis Applied In The Decisions Below is Inconsistent With This Court's Qualified Immunity Decisions 8

1. The Decisions Below Were Inconsistent With The Two-Part Test That This Court Has Consistently Required Lower Courts To Use In Analyzing Qualified Immunity 8

2. The Decisions Below Were Inconsistent with Supreme Court Decisions Ruling that The

Determination of Whether the Defendant Could Believe His Conduct Complied With Clearly Established Law Is An Issue of Law 10

B. Certiorari Should Be Granted Because The Decision Below Is Inconsistent With The Approach Taken By Other Circuits, Which Consider Whether Officials Could Reasonably Have Believed that Their Actions Were Consistent With Clearly Established Law 13

C. Certiorari Should Be Granted So That This Court Can Establish A Uniform Application of the Second Prong of Qualified Immunity Because The Circuits Have Utilized Inconsistent Tests, Both Internally and From Circuit to Circuit 19

D. The Circuit Court's Rejection Of The Commissions' Eleventh Amendment Claim By Application Of A New Standard Placing The Burden Of Proof On Defendants To Affirmatively Establish Facts In Support Of Eleventh Amendment Immunity Was Inconsistent With Law And Policy, Particularly In Refusing To Remand The Issue To Allow Defendants To Comply With The New Standard 23

1. The Third Circuit's New Standard Is Improper 25

2. The Third Circuit's Refusal To Remand For Development Of A Factual Record Reflects A Serious Conflict With The Manner In Which Other Circuits Give Parties An

Opportunity To Comply With A New Rule On Burden Of Proof 26

CONCLUSION 30

APPENDIX A 1a

APPENDIX B 20a

APPENDIX C 41a

TABLE OF AUTHORITIES

Cases

Act Up!/Portland v. Bagley,
988 F. 2d 868 (9th Cir. 1993) 17

Amsden v. Moran,
904 F.2d 748 (1st Cir. 1990) 14

Anderson v. Creighton,
483 U.S. 641 (1987) 5, 7, 8-9, 10, 12, 16

Anderson v. Liberty Lobby,
477 U.S. 242 (1986) 25

Bell v. Manson,
590 F.2d 1224 (2d Cir. 1978) 27-28

Brown v. Grabowski,
922 F.2d 1097 (3d Cir. 1990) 6

Burns v. Reed,
44 F.3d 524 (7th Cir.) *cert. denied*,
115 S. Ct. 2583 (1995) 21

Cartier v. Lussier,
955 F.2d 841 (2d Cir. 1992) 14

Christy v. Pennsylvania Turnpike Commission,
845 F.Supp. 1097 (E.D. Pa. 1994) 6

Christy v. Pennsylvania Turnpike Commission,
1995 WL 127077 (3d Cir. March 27, 1995) 7

Christy v. Pennsylvania Turnpike Commission,
54 F.3d 1140 (3d Cir. 1995) 7, 11-12, 23

Coen v. Runner,
854 F.2d 374 (10th Cir. 1988) 22-23

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541 (1949) 13

Concerned Citizens of Vicksburg v. Sills,
567 F.2d 646 (5th Cir. 1978) 28

Davis v. Scherer,
468 U.S. 183 (1984) 8

DeVargas v. Mason & Hanger-Silas Co.,
844 F.2d 714 (10th Cir. 1988) 23

Doe v. Taylor Independant School District,
15 F.3d 443 (5th Cir.), *cert. denied sub nom.*
Lankford v. Doe, 115 S. Ct. 70 (1994) 21

Duckett v. City of Cedar Park,
950 F.2d 272 (5th Cir. 1992) 17, 21

EEOC v. Westinghouse Elec. Corp.,
925 F.2d 619 (3d Cir. 1991) 27

Ellis v. Wynalda,
999 F.2d 243 (7th Cir. 1993) 18

Figueroa-Rodriguez v. Aquino,
863 F.2d 1037 (1st Cir. 1991) 13

Gooden v. Howard County,
954 F.2d 960 (4th Cir. 1992) 12, 16

Graham v. Connor,
490 U.S. 386 (1989) 15

Guercio v. Brody,
911 F.2d 1179 (6th Cir. 1990) *cert. denied*, 500 U.S.
904 (1991) 20

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 8, 10, 15

Hawkes v. IRS,
467 F.2d 787 (6th Cir. 1972). 28

Henderson v. Baird,
29 F.3d 464 (8th Cir. 1994) *cert. denied*, 115 S. Ct.
2584 (1995) 20

Hess v. Port Authority Trans-Hudson Corp.,
115 S. Ct. 394 (1994) 6, 24

Hinton v. City of Elwood Kansas,
997 F.2d 774 (10th Cir. 1993) 23

Huecker v. Milburn,
538 F.2d 1241 (6th Cir. 1976) 28

Hunter v. Bryant,
502 U.S. 224 (1991) 8, 15, 16

ITSI TV Productions v. Agricultural Associations,
3 F.3d 1289 (9th Cir. 1993) 23

Johnson v. Jones,
115 S.Ct. 2151 (1995) 10, 11, 12, 16

Jones by Jones v. Webb,
45 F.3d 178 (7th Cir. 1995) 18, 22

Kelly v. Curtis,
21 F.3d 1544 (11th Cir. 1994) 20

Kokkonen v. Guardian Life Insurance Company of America, 114 S. Ct. 1673 (1994) 25

Korn v. Franchard Corp.,
456 F.2d 1206 (2d Cir. 1972). 28

Lassiter v. Alabama A&M University,
28 F.3d 1146 (11th Cir. 1994) 20

Long v. Norris,
929 F.2d 1111 (6th Cir.), *cert. denied sub nom. Jones v. Long*, 502 U.S. 863 (1991) 20

MacDonald v. Haskins,
966 F.2d 292 (7th Cir. 1992) 22

Malley v. Briggs,
475 U.S. 335 (1986) 8, 9

Mangieri v. Clifton,
29 F.3d 1012 (5th Cir. 1994) 16-17, 21

Mahers v. Harper,
12 F.3d 783 (8th Cir. 1993) 20

Marshall v. Allen,
984 F.2d 787 (7th Cir. 1993) 21-22

McNutt v. General Motors Acceptance Corp.
298 U.S. 178 (1936) 25

Mitchell v. Forsyth,
472 U.S. 511 (1985) 6, 8, 10-11, 13, 23

O'Neill v. Town of Babylon,
986 F.2d 646 (2d Cir. 1993) 14

Perez v. Simmons,
884 F.2d 1136 (9th Cir. 1988) 27

Port Authority Police Benevolent Ass'n v. Port Authority of New York & New Jersey,
819 F.2d 413 (3d Cir. 1987). 24

Pritchett v. Alford,
973 F.2d 307 (4th Cir. 1992) 19

Pueblo Neighborhood Health Center, Inc. v. Losavio,
847 F.2d 642 (10th Cir. 1988) 22-23, 26

Rengers v. WCLR Radio Station,
857 F.2d 363 (7th Cir. 1988) 27

Rodriques v. Furtado,
950 F.2d 805 (1st Cir. 1991) *cert denied*,
498 U.S. 1041 (1991) 13

Romero v. Kitsap County,
931 F. 2d 624 (9th Cir 1991) 17-18

Romero v. Fay,
45 F.3d 1472 (10th Cir. 1995) 18

Rosciszewski v. Arete Associates, Inc.,
1 F.3d 225 (4th Cir. 1993) 26-27

Rowland v. Perry,
41 F.3d 167 (4th Cir. 1994) 14-15

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) 5

Satcher v. Honda Motor Co., Ltd.,
993 F.2d 56, 57 (5th Cir. 1993) 27

Schroeder v. McDonald,
55 F. 3d 454 (9th Cir. 1995) *17*

Smith v. Cooper/T. Smith Corp.,
886 F.2d 755 (5th Cir. 1989) 27

Thompson v. City of Starkville,
901 F.2d 4 (5th Cir. 1990) 21

Tribble v. Gardner,
860 F.2d 321 (9th Cir. 1988) 18

Walter v. Morton,
33 F.3d 1240 (10th Cir. 1994) 23

Weaver v. Brenner,
40 F.3d 527 (2d Cir. 1994) 14

Wilkins v. University of Houston,
695 F.2d 134, 135 (5th Cir.1983) 27

Statutes and Rules

28 U.S.C. § 1331 4

28 U.S.C. § 1254 2

42 U.S.C. § 1983 4

F. R. Civ. P. 56 29

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OPINIONS BELOW

The opinion of the District Court below is reported at 845 F.Supp. 1097 (E.D. Pa. 1994), and is reproduced *infra* at App. 1a-18a. The Opinion of the Third Circuit Court of Appeals is reported at 54 F.3d 1140 (3d Cir. 1995), and is reproduced *infra* at App. 23a-39a.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was initially entered on March 27, 1995. The Court of Appeals granted rehearing, vacating the initial judgment, and subsequently filed a new opinion and judgment on May 23, 1995. The Court of Appeals denied the Petitioners' timely petition for rehearing on July 13, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE CASE

Factual Background

Petitioners Vincent Greco and John Stewart are mid-level managers at the Pennsylvania Turnpike Commission, an instrumentality of the Commonwealth of Pennsylvania. Petitioner Robert Brady is a Commissioner of the Pennsylvania Turnpike Commission. In 1993, there was a vacancy for the position of Eastern Region paint crew foreman. Pursuant to established procedures for filling vacancies,[1] several people, including Respondent, Charles Christy (a Commission employee) applied for the position. Petitioners, Vincent Greco and John Stewart, as well as another Commission official, John

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1 The procedure followed in 1993 for making promotions involved a three-step process. First, a three-member interview committee would be appointed to interview all candidates using a predetermined list of questions. The committee could recommend from three to six candidates to the Commission Personnel Committee. The Personnel Committee reviewed the material supplied by the interview committee and selected one candidate to recommend to the Commissioners. The Commissioners then voted to approve or reject the recommendation.

Boschi, conducted interviews of all applicants. Following Commission procedure, this interview committee recommended three individuals, Christy, another Turnpike employee, Sean Pilecki, and one non-Commission employee, as the three most qualified candidates for this position. In accordance with Commission procedure, these three candidates' names were submitted to the Personnel Committee which recommended Sean Pilecki for the position. The Commissioners then approved the recommendation and Pilecki became paint crew foreman.[2]

Petitioners Greco and Stewart had nothing to do with the filling of the paint crew foreman vacancy after interviewing Christy and recommending him as one of the three most qualified candidates.

Stewart also interviewed Christy for another promotion candidacy, as Regional Equipment Manager - Eastern Division, but in that case the three interviewers did not recommend Christy as one of the three top candidates for this position. Following Commission procedure, one of the three top candidates was recommended by the Commission's Personnel Committee, and that recommendation was then approved by the Commissioners.

Petitioner Robert Brady is the only Commissioner originally named as a defendant in this case; his only role in this case was to vote to approve on a "yes or no" basis the

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2 After the petitioners filed for summary judgment, Plaintiff Christy added as defendants all members of the Personnel Committee and the remaining Commissioners, as well as Sean Pilecki and his father, a retired Commission employee. Summary judgment motions asserting qualified immunity are currently pending for all of the added defendants in the District Court.

recommendations of the Personnel Committee for the paint crew foreman, and Regional Equipment Manager - Eastern Division positions.

Summary Judgment Motions

Christy filed suit pursuant to 42 U.S.C. § 1983 alleging that the defendants made adverse employment decisions against him based on his political affiliation, in violation of his First Amendment rights. Jurisdiction before the District Court arose pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331 (general federal question jurisdiction).

Greco and Stewart moved for summary judgment on grounds, *inter alia*, of qualified immunity, asserting that because they merely interviewed Christy, among other candidates, for the promotion, and had no participation in the final selection process, they should not have to stand trial. Greco asserts that it would be legally and factually absurd to hold him for trial in this case when his only involvement was to **recommend** Christy as one of the three top candidates.

Brady also moved for summary judgment asserting qualified immunity. He stated in an affidavit uncontradicted on the record that all he did was vote to approve the single candidate recommended by the Personnel Committee for each promotion.

Under the Qualified Immunity doctrine, there are two separate inquiries. The first is whether the legal principles governing the defendants' actions were clearly established at the time. If the relevant law was clearly established, the second inquiry must be posed, whether a reasonable official in the circumstances of each defendant would believe that his or her conduct was consistent with the clearly established law.

This issue is addressed under a test of "objective reasonableness". *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Qualified immunity protects an official, even when the relevant law is clearly established, where a reasonable official in the same circumstances could conclude that his actions were consistent with clearly established law.

Petitioners do not claim ignorance or confusion about the applicability of clearly established legal principles relevant to the promotions at issue. Under *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), political discrimination in public employment promotional decisions is unconstitutional. There is no confusion about this principle in this case; the issue is whether Greco and Stewart (who merely interviewed Christy as part of a "screening" panel), and whether Brady (who merely voted to approve the recommended applicant), could reasonably have believed that their conduct was consistent with *Rutan*.

The Decisions Below

After reviewing Christy's allegations, the district court devoted most of its opinion to describing the *Rutan* decision, and that it established clear legal principles, even though Petitioners had never denied that *Rutan* applied. The district court abruptly disposed of the second prong of the qualified immunity issues by concluding as follows:

> "[I]t is clear that defendants were all involved in the promotions process in this case. Accordingly, viewing all of the evidence...in the manner most favorable to the plaintiff, we are unable to find as a matter of law that these defendants did not violate Mr. Christy's clearly established rights or that they are entitled to the cloak of qualified immunity from this suit."

Christy v. Pennsylvania Turnpike Commission, 845 F.Supp. 1097, 1105 (E.D. Pa. 1994) (App. at 14a-15a). Neither the plaintiff nor the district court identified any factual issues to prevent a decision on qualified immunity.

A pre-trial appeal was taken pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985).[3] On the issue of qualified immunity, the Court of Appeals initially refused even to accept appellate jurisdiction on this issue by stating:

> We will dismiss for lack of appellate jurisdiction the individual defendants' appeals from the district court's denial of their motions for summary judgment on qualified immunity grounds. While we have appellate jurisdiction to consider the denial of summary judgment when such denial is based on the district's conclusion that the movant is not entitled to qualified immunity, *see, e.g., Brown v. Grabowski*, 922 F.2d 1097, 1105 (3d Cir. 1990), the district court in this case did not rule that the individual defendants were not entitled to qualified immunity. Rather, it ruled that it could not find qualified immunity based on the facts at summary judgment. The district court could still find at the close of evidence at trial that the individual defendants are entitled to qualified immunity in relation to Christy's

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3 This appeal included the issue of whether the Pennsylvania Turnpike Commission itself was entitled to Eleventh Amendment Immunity. The Court of Appeals denied immunity largely in reliance on this Court's opinion in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S.Ct. 394 (1994). However the Court of Appeals refused to remand the issue for development of a record to meet the requirements of *Hess*, even though remand had been specifically requested by the Commission. *See infra* at 23-24.

> claims brought against them in their individual capacities.

Christy v. Pennsylvania Turnpike Commission, 1995 WL 127077, *1 n.4 (3d Cir. March 27, 1995), rehearing granted April 27, 1995, on rehearing, 54 F.3d 1140 (3d Cir. 1995).

On petition for rehearing, the original opinion of the panel was vacated. Without additional briefing or argument, a new opinion issued, which acknowledged appellate jurisdiction but affirmed the denial of qualified immunity. After finding that it had appellate jurisdiction, the Third Circuit held as follows:

> When the disputed facts are viewed in the light most favorable to Christy . . . we agree that the individual defendants were not entitled to qualified immunity.

Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1143 n.4 (3d Cir. 1995) (App. at 27a).

The Third Circuit's analysis of the issue of qualified immunity is contrary to settled law of this Court and most courts of appeals. Under the second prong of the qualified immunity test, the issue is whether the defendant's conduct would strike an objective observer as falling within the range of reasonable judgment. *Anderson v. Creighton*, 483 U.S. 635 (1987). The District Court and the Third Circuit failed to apply the second prong in this case by viewing the facts in the light most favorable to the plaintiff.

REASONS FOR GRANTING THE PETITION

A. The Analysis Applied In The Decisions Below is Inconsistent With This Court's Qualified Immunity Decisions

1. The Decisions Below Were Inconsistent With the Two-Part Test That This Court Has Consistently Required Lower Courts To Use in Analyzing Qualified Immunity

This Court has repeatedly and consistently held that officials are entitled to qualified immunity if the legal principles governing their actions were not clearly established, or if reasonable officials in the same circumstances would believe that their actions conformed to the clearly established legal principles. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) ("the court should ask whether the [defendants] acted reasonably under settled law in the circumstances"); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985); *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (qualified immunity depends on "'the objective reasonableness of [the defendant's] conduct as measured by reference to clearly established law'") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

In *Anderson v. Creighton*, this Court held that "the principles of qualified immunity that we reaffirm today require that [the defendant] be permitted to argue that he is entitled to summary judgment on the ground that, in light of the clearly established principles governing [his conduct], he could, as a matter of law, reasonably have believed that [the action taken] was lawful." 483 U.S. at 641 (footnote omitted). *Anderson* reaffirmed that this Court has upheld qualified immunity for

officials "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Id.* at 638. In *Malley v. Briggs*, this Court stated that qualified immunity protects "all but the plainly incompetent or those that knowingly violate the law." 475 U.S. at 341.

Qualified immunity, as formulated by this Court, protects an official, even when the relevant law is clearly established, where a reasonable official in the same circumstances could conclude that his actions were consistent with the clearly established law.

The Third Circuit (and the District Court) in this case considered the qualified immunity claims of Petitioners in a manner clearly inconsistent with the analysis this Court has used and required lower courts to use. Both the District Court and the Court of Appeals below erroneously analyzed the facts "in the light most favorable to plaintiff," which denied the defendants the benefit of the "objectivity reasonable" test uniformly applied by this Court and most other courts of appeal. The courts below denied qualified immunity to the Petitioners after concluded that the law governing Petitioners' actions were clearly established, without even considering whether the defendants could reasonably have believed that their conduct was consistent with clearly established law.

The approach used by the courts below fails to effectuate the important policies underlying qualified immunity. Determining qualified immunity based solely on whether the law was clearly established unduly limits its application to situations where governing legal principles are developing or uncertain. However, this Court has never spoken in such limited terms about the doctrine. Rather, it has stated that qualified immunity is intended to guard against the danger that litigation and potential personal liability "will unduly inhibit

officials in the discharge of their duties." *Anderson*, 483 U.S. at 638 (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). While recognizing the need to provide redress against officials who abuse their position, this Court has focused on the social costs that result from suits against public officials, and the decreased effectiveness, energy and ardor of an official forced to defend his actions. *Harlow v. Fitzgerald*, 457 U.S. at 814. This potential cost is equally real whether the applicable law is developing or already clearly established. The focus has always been on the reasonableness of the official's conduct rather than the state of the relevant law.

The incomplete test applied by the courts below, considering only whether the law is clearly established, is too narrow to vindicate the important policies underlying qualified immunity.

2. The Decisions Below Were Inconsistent with Supreme Court Decisions Ruling that The Determination of Whether the Defendant Could Believe His Conduct Complied With Clearly Established Law Is An Issue of Law

The decisions of the District Court and Court of Appeals, in reviewing the facts "in the light most favorable to plaintiff" were directly inconsistent with decisions of this Court, that courts "need not consider the correctness of the plaintiff's version of the facts." *Mitchell v. Forsyth*, 472 U.S. at 528; *See also Johnson v. Jones*, 115 S. Ct. 2151, 2156 (1995). In *Mitchell*, the Court held that the issue raised in an appeal from a denial of qualified immunity is "a purely legal one." 472 U.S. at 528 n. at 9. In explaining why a denial of qualified immunity is immediately appealable, the Court stated:

> [An] Appellate Court reviewing the denial of defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts, the defendant's conduct violated clearly established law, ***whether the law clearly proscribes the actions the defendant claims he took.***

Id. at 428 (footnote omitted, emphasis added).

In *Johnson*, the Court reviewed the *Mitchell* rationale in detail and unanimously reaffirmed it. However, the specific claim in *Johnson* involved not an assertion that the defendant reasonably could have believed his conduct was legal, but rather an assertion that he did not even engage in the conduct alleged -- a purely factual inquiry. Thus, *Johnson* held that appellate jurisdiction did not lie under the collateral order doctrine. 115 S. Ct. at 2159.

Unlike *Johnson*, the qualified immunity claim in this case does not involve a factual issue of what the petitioners did or did not do. The claim is based strictly on the assertion that the petitioners could reasonably have believed that their conduct in connection with the disputed promotions was consistent with the clearly established law. Neither court below addressed this question. Instead, the district court denied qualified immunity merely by "viewing all of the evidence in this matter in light of the foregoing precedent and in the manner most favorable to the plaintiff." 845 F. Supp. at 1105

(App. at 14a-15a). The Third Circuit repeated this error by concluding that "when the disputed facts are viewed in the light most favorable to Christy, as they must at summary judgment, we agree that the individual defendants were not entitled to qualified immunity." 54 F.3d at 1143, n.4 (App. at 27a).

It was legal inconsistent with Supreme Court precedent for the Third Circuit to refuse to consider the second prong of the qualified immunity test, by referring to disputed facts and ruling that the facts must be "viewed in the light most favorable to Christy". The lower courts in this case were duty bound to look at the conduct of the defendants from the point of view of an objective observer, and decide whether their conduct "would strike an objective observer as falling within the range of reasonable judgment." *See, e.g., Gooden v. Howard County, Maryland,* 954 F.2d 960, 965 (4th Cir. 1992) (citing *Anderson v. Creighton, supra*).

Indeed, the Third Circuit's treatment of this issue is inconsistent with its acceptance of jurisdiction in footnote 4 of its opinion.[4] As pointed out by this Court this last term in *Johnson v. Jones*, 115 S.Ct. 2151 (1995), a reviewing court has jurisdiction to decide the issue of qualified immunity prior to trial if the record shows that those facts necessary for consideration of the issue are not in dispute. On the other hand, where the determination of qualified immunity only involves a factual issue of whether the defendant engaged in the alleged illegal conduct, there is no interlocutory appellate jurisdiction. *Id.* at 2159. By ruling that it had jurisdiction of

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4 Acknowledging that this Court was considering the interlocutory jurisdiction issue in *Johnson v. Jones*, 115 S. Ct. 2151 (1995), the Court of Appeals asserted that it had jurisdiction to decide the qualified immunity issue, which necessarily implied that there were no factual disputes concerning resolution of that issue. 54 F.3d at 1143, n.4 (App. at 27a).

the issue under the collateral order doctrine,[5] the Third Circuit acknowledged *a fortiori* that there were no disputed facts on the issue of qualified immunity. That is true of the record in this case, where there is no dispute as to what Petitioners Greco, Stewart and Brady did or did not do, and therefore no dispute of fact material to the determination of qualified immunity. The refusal of the Court of Appeals to address qualified immunity as a legal issue was inconsistent with the decisions of this Court.

B. Certiorari Should Be Granted Because The Decision Below Is Inconsistent With The Approach Taken By Other Circuits, Which Consider Whether Officials Could Reasonably Have Believed That Their Actions Were Consistent With Clearly Established Law

The partial qualified immunity analysis applied by the Court below is inconsistent with the more complete analysis applied by a number of other circuits which determine not only whether the relevant legal standards were "clearly established" but also whether the official reasonably could have believed his actions were consistent with clearly established law.

First Circuit. In *Figueroa-Rodriguez v. Aquino*, 863 F.2d 1037, 1043 (1st Cir. 1991), the court analyzed both prongs of the qualified immunity rule to find 1) that the alleged constitutional right was not clearly established; and 2) the defendants' objective perception of their action was the focus of the inquiry. *See also Rodriques v. Furtado*, 950 F.2d 805, 812 (1st Cir. 1991) *cert. denied*, 498 U.S. 1041 (1991) (affirming grant of qualified immunity in Fourth Amendment

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5 *See Mitchell v. Forsyth*, 472 U.S. at 528-30 (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)).

(affirming grant of qualified immunity in Fourth Amendment case, finding that defendant could reasonably have believed his conduct was legal); *Amsden v. Moran*, 904 F.2d 748 (1st Cir. 1990) (affirming grant of qualified immunity in case alleging Fourteenth Amendment due process violations, where relevant law was clearly established, but defendant could reasonably have believed his conduct was legal).

Second Circuit. In *Weaver v. Brenner*, 40 F.3d 527, 537 (2d Cir. 1994), the district court had granted or denied qualified immunity on separate claims, in a case involving the application of the constitutional protection against self-incrimination in a criminal case. The Court of Appeals granted qualified immunity, stating that:

> [a] determination that the relevant right was clearly established at the time it was allegedly violated by the public officials does not end the qualified immunity inquiry. The defendants are still entitled to qualified immunity if it was objectively reasonable for them to believe their actions were lawful.

Id. at 536-37. *See also O'Neill v. Town of Babylon*, 986 F.2d 646, 649-50 (2d Cir. 1993) (reversing denial of qualified immunity in post-trial appeal because it was objectively reasonable for defendant to believe his actions were consistent with clearly established law); *Cartier v. Lussier*, 955 F.2d 841 (2d Cir. 1992) (reversing a denial of qualified immunity in Fourth amendment case because defendant could reasonably have believed his actions were legal).

Fourth Circuit. In *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994), the Court of Appeals affirmed the grant of qualified immunity in a civil rights claim for excessive force and unlawful detention brought against a police officer arising out

of a scuffle with a private citizen. The Court emphasized the "objective reasonableness" standard prescribed by this Court. In affirming the grant of qualified immunity to the police officer, the Court of Appeals stated:

> The reasonableness inquiry is an objective one. [*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).] To gauge objective reasonableness, a court examines only the actions at issue and measured them against what a reasonable police officer would do under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). Subjective factors involving the officer's motives, intent, or propensities are not relevant. The objective nature of the inquiry is specifically intended to limit examination into an officer's subjective state of mind, and thereby enhance the chances of a speedy disposition of the case. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).
>
> Though it focuses on the objective facts, the immunity inquiry must be filtered through the lens of the officer's perceptions at the time of the incident in question. Such a perspective serves two purposes. First, using the officer's perception of the facts at the time limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight. Second, using this perspective limits the need for decision-makers to sort through conflicting versions of the "actual" facts, and allows them to focus instead on what the police officer reasonably perceived. In sum, the officer's subjective state of mind is not relevant to the qualified immunity inquiry but his perceptions of the objective facts of the incident in question are.

41 F.3d at 172-73 (lower court citations omitted).

Similarly, in *Gooden v. Howard County, Maryland*, 954 F.2d 960 (4th Cir. 1992), the same court upheld qualified immunity in a Fourth Amendment claim against police officers who had taken an apartment occupant into custody for emergency psychiatric evaluation, based on their belief that she was the source of a disturbance and posed a threat to herself and others. This case reaffirmed that the appropriate focus of objective reasonableness is on the conduct of the defendants, not the state of the law:

> [t]he basic purpose of qualified immunity is to spare individual officials the burdens and uncertainties of standing trial in those instances where their conduct would strike an objective observer as falling within the range of reasonable judgment."

Id. at 965 (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)).

Fifth Circuit. Clear application of qualified immunity doctrine is also shown in the decision of the Fifth Circuit Court of Appeals in *Mangieri v. Clifton*, 29 F.3d 1012 (5th Cir. 1994). In *Mangieri* the Court stated flatly what this Court has been holding for a number of years, "we recently determined that a district court errs in 'holding that the objective reasonableness prong of the qualified immunity standard is generally a factual question for the jury.'" Id. at 1015 (relying on *Hunter v. Bryant*, 502 U.S. 224 (1991)).

Anticipating the holding of *Johnson v. Jones*, 115 S. Ct. 2151 (1995), the Court noted that some disputed questions of fact could eliminate jurisdiction to hear a pretrial appeal of denial of summary judgment, but that the objective reasonableness issue was not an issue of fact. After discussing the facts, the Fifth Circuit used the appropriate analysis to conclude that the defendants "possessed the requisite

objectively reasonable basis for probable cause to arrest" the plaintiff. 29 F.2d at 1018. *See also Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir. 1992) (granted qualified immunity in case alleging due process violations, stating that well-settled state of the law was not dispositive, and that the grant of qualified immunity depended on whether, according to an objective standard, a reasonable official would have known his conduct to be unlawful).

Ninth Circuit. The Ninth Circuit has consistently applied both prongs of qualified immunity. In *Schroeder v. McDonald*, 55 F. 3d 454 (9th Cir. 1995), the Court stated:

> The qualified immunity test required a two-part analysis: "(1) was the law governing the officials' conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?" * * * Because the law governing defendants' conduct was clearly established, we must determine whether a reasonable prison official could have believed the conduct was lawful.

Id. at 461 (quoting *Act Up!/Portland v. Bagley*, 988 F. 2d 868, 871 (9th Cir. 1993)). In applying this test to an Eighth Amendment claim, the court held that the defendants were entitled to qualified immunity in all but one of the asserted claims.

In *Romero v. Kitsap County*, 931 F. 2d 624 (9th Cir 1991), the Court reversed the district court's denial of qualified immunity, emphasizing that "regardless of whether the [alleged] constitutional violation occurred, the officer should prevail if the right asserted by the Plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful." *Id.* at 627.

In explaining the error of the district court below, the *Romero* court gave instructions that might well have been heeded by the courts below in this case:

> However, when qualified immunity is at stake, a court must first determine whether the law has been clearly established. *Tribble [v. Gardner]*, 860 F.2d at [321, 324 (9th Cir. 1988)]. If the court decides the law is clearly established, it must then decide whether a reasonable officer would have known that his conduct violated rights. *Id.*

Romero, 931 F.2d at 628.[6]

This survey of circuits demonstrates that the approach taken to analyze the petitioners' qualified immunity claims in this case is starkly inconsistent with the two-prong test applied in most other circuits. Petitioners assert that if the District Court or Court of Appeals below had applied both parts of the test for qualified immunity, it would have concluded that the petitioners were entitled to summary judgment on qualified immunity grounds. The basis for this assertion is clear: the petitioners were following a Commission procedure for determining promotions that was set up in order to comply with

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6 At least two additional circuits have applied the second prong of qualified immunity test in cases involving alleged Fourth Amendment violations. ***Seventh Circuit*** -- *Jones by Jones v. Webb*, 45 F.3d 178, 184 (7th Cir. 1995) (granting qualified immunity in excessive force case because "reasonable officer in [defendant's] position would have believed that the force applied was justified in light of existing law); *Ellis v. Wynalda*, 999 F.2d 243, 246 (7th Cir. 1993) (applying "objective reasonableness" prong, but concluding that officer was not entitled to qualified immunity); ***Tenth Circuit*** -- *Romero v. Fay*, 45 F.3d 1472, 1475-76 (10th Cir. 1995) (applying objective reasonableness inquiry to fourth amendment claim and granting qualified immunity).

Rutan. There is no dispute that the procedure was in fact followed, and no dispute as to the limited involvement of the Petitioners; as a matter of law petitioners could reasonably believe, therefore, that their conduct was consistent with *Rutan*. This Court should grant certiorari to clearly hold that the second prong identified in Supreme Court decisions and applied by numerous other circuits must be uniformly applied as part of the test for qualified immunity.

C. Certiorari Should Be Granted So That This Court Can Establish A Uniform Application of the Second Prong Of Qualified Immunity Because The Circuits Have Utilized Inconsistent Tests, Both Internally and From Circuit to Circuit

While most circuits' application of the two prong approach is consistent with this Court's decisions, the tests applied by some of the circuits are inconsistent and in some cases confused, not only from court to court but also within some circuits. As stated above, the most common approach is to consider both prongs of the test: whether the law is clearly established, and whether the defendants reasonably could have believed their conduct was consistent with the clearly established law. *See supra* at 13-18.

Several courts, however, have incorrectly incorporated the second prong - whether a reasonable official could believe his actions were lawful - not as a separate prong, but as a means of evaluating whether the law was clearly established.

Fourth Circuit. *Pritchett v. Alford*, 973 F.2d 307, 315 (4th Cir. 1992) (holding that a finding that an alleged right was clearly established necessarily resolved the issue of objective reasonableness and precluded qualified immunity because a

reasonably competent official would have known that his actions would violate that right).

Sixth Circuit. *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir.), *cert. denied sub nom. Jones v. Long*, 502 U.S. 863 (1991) (granting qualified immunity because the law regarding unreasonable searches of prison visitors was not clearly established, and noting that the objective reasonableness component of the qualified immunity analysis was not a separate consideration, but rather furthered the end of determining whether a particular right was clearly established); *Guercio v. Brody*, 911 F.2d 1179, 1183-84 (6th Cir. 1990), *cert. denied*, 500 U.S. 904 (1991) (ruling that court must determine whether the law is so clearly established at the time of the alleged violation that a reasonable actor should know that his action is unlawful).

Eighth Circuit. *Henderson v. Baird*, 29 F.3d 464, 467 (8th Cir. 1994) *cert. denied,* 115 S.Ct. 2584 (1995) (determination whether right is clearly established is based in part on whether reasonable official would understand his actions to violate that right); *Mahers v. Harper*, 12 F.3d 783, 785 (8th Cir. 1993) (same).

Eleventh Circuit. *Lassiter v. Alabama A&M University*, 28 F.3d 1146, 1149 (11th Cir. 1994) ("for the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed . . . to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law.") (quoting *Anderson*, 483 U.S. at 640); *Kelly v. Curtis*, 21 F.3d 1544 (11th Cir. 1994) (plaintiff must show that "the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful").

Several of the Circuits use the second prong in cases involving Fourth Amendment claims, but apparently not in other contexts.

Fifth Circuit. *Compare Thompson v. City of Starkville*, 901 F.2d 456, 468 & n.12 (5th Cir. 1990) (employment termination claim in which the court denied qualified immunity; objective reasonableness was considered only in terms of whether the law was so clearly established that a reasonable official would have understood that his conduct violated that right), and *Doe v. Taylor Independent School District*, 15 F.3d 443, 455-56 (5th Cir.), *cert. denied sub nom., Lankford v. Doe*, 115 S. Ct. 70 (1994) (in case alleging substantive due process violations, analyzing qualified immunity claim only with respect to whether the allegedly violated right was clearly established, and stating that if the law was indeed clearly-established, then a reasonable person should and would know when his conduct violated that law) *with Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir. 1992) (in case alleging due process violations arising from an improper arrest, court granted qualified immunity stating that well-settled state of the law was not dispositive, and that the grant of qualified immunity depended on whether, according to an objective standard, a reasonable official would have known his conduct to be unlawful), and *Mangieri v. Clifton*, 29 F.3d 1012, 1018 (5th Cir. 1994) (in Fourth Amendment case, court granted qualified immunity because the defendants "possessed the requisite objectively reasonable basis for probable cause to arrest" the plaintiff).

Seventh Circuit. *Compare Burns v. Reed*, 44 F.3d 524, 526 (7th Cir.) *cert. denied*, 115 S.Ct. 2583 (1995) (in case alleging due process violations based on allegedly coerced confessions, qualified immunity was addressed only in terms of whether the law was clearly established), and *Marshall v. Allen*,

984 F.2d 787, 792-93 (7th Cir. 1993) (in case alleging retaliatory discharge in violation of First Amendment rights, qualified immunity analyzed only in terms of whether relevant law was clearly established), *with Jones by Jones v. Webb*, 45 F.3d 178, 183-84 (7th Cir. 1995) (in case alleging unreasonable seizure and excessive force, qualified immunity analyzed in terms of whether a reasonable officer could have believed his conduct was constitutional in light of existing law), and *MacDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992) (excessive force claim in which qualified immunity defense was decided by looking to both the clearly established law and to "whether, at the time of the seizure, a reasonable officer could have believed [defendant's] conduct was constitutional" in light of existing law.)

The analysis applied by these circuits in the context of Fourth Amendment/arrest claims is consistent with the analysis used by this Court, and Petitioners submit that these cases correctly analyze qualified immunity. On the other hand, nothing in this Court's decisions supports or justifies the failure to consider the second prong of qualified immunity in other contexts.

Tenth Circuit. Finally, the Tenth Circuit has developed its own version of the standard:

> Once the defense has been raised and the plaintiffs have met their burden of identifying both the clearly established law that the government official is alleged to have violated and the conduct that violated that law, the defendant must demonstrate that no material issues of fact remain as to whether his or her actions were objectively reasonable in light of the law and the information he or she possessed at the time. *Pueblo Neighborhood Health Center, Inc. v. Losavio*, 847 F.2d

642, 646 (10th Cir. 1988). A defendant who makes such a showing of objective reasonableness is entitled to summary judgment unless the plaintiff can demonstrate that there are factual disputes relevant to the defendant's claim to immunity. *DeVargas v. Mason & Hanger-Silas Co.*, 844 F.2d 714, 719 (10th Cir. 1988) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

Coen v. Runner, 854 F.2d 374, 377 (10th Cir. 1988). *See also Walter v. Morton*, 33 F.3d 1240, 1242-43 (10th Cir. 1994); *Hinton v. City of Elwood Kansas*, 997 F.2d 774, 449 (10th Cir. 1993).

Clearly, there are significant inconsistencies among and within the circuits regarding the proper test for applying qualified immunity. Even though there are scores of appellate decisions issued every year on this issue, there exists a serious lack of uniformity as to the test to be applied.

D. The Circuit Court's Rejection Of The Commissions' Eleventh Amendment Claim By Application Of A New Standard Placing The Burden Of Proof On Defendants To Affirmatively Establish Facts In Support Of Eleventh Amendment Immunity Was Inconsistent With Law And Policy, Particularly In Refusing To Remand The Issue To Allow Defendants To Comply With The New Standard

The Third Circuit, in an issue of "apparent first impression in this Circuit", held that defendants asserting Eleventh Amendment immunity bear the burden to establish that it should apply. 54 F.3d at 1144 (citing *ITSI TV Productions v. Agricultural Associations*, 3 F.3d 1289 (9th Cir. 1993)), (App. at 28a). That threshold determination virtually pre-determined the outcome of the Eleventh Amendment

analysis, since the record was not developed on the factors which this Court recently held relevant in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), and on which decision the Third Circuit relied in denying Eleventh Amendment immunity. *Hess* substantially overruled a prior Third Circuit case, *Port Authority Police Benevolent Ass'n v. Port Authority of New York & New Jersey*, 819 F.2d 413 (3d Cir. 1987). The relevant factors include Commission funding, ability of the Commission to satisfy judgments against it, and the Commonwealth's obligations for judgments against the Commission.

Since the Eleventh Amendment, where applicable, deprives the court of jurisdiction, the Commission moved for summary judgment based on plaintiff's failure to present any facts that would subject the Commission to jurisdiction. The Third Circuit held, for the first time, however, that a defendant asserting Eleventh Amendment immunity must do more -- it must affirmatively establish facts that justify the Eleventh Amendment immunity. This new rule shifts and dramatically increases the burden placed on defendants who are claiming Eleventh Amendment immunity. However, the defendants were not given any opportunity to meet the heightened burden. Instead of remanding the Eleventh Amendment issue to the district court, the panel affirmed the district court's decision which had not applied the new standard. Particularly under the unique circumstances of this case, including the fact that the plaintiff, in response to the Commission's assertion of Eleventh Amendment immunity, dropped the Commission as a defendant,[7] it was improper for the panel to fully deny Eleventh

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7 After the Commission asserted Eleventh Amendment immunity, plaintiff conceded in his Memorandum in Opposition to the Motion for Summary Judgment, filed December 21, 1993, that the Commission sh uld (continued...)

Amendment immunity without giving the Commission an opportunity to develop a record on the relevant issues.

1. The Third Circuit's New Standard Is Improper

In moving for summary judgment, the Commission set forth abundant legal authorities, including state decisional law, and described Pennsylvania's statutory scheme establishing and regulating the Commission. In response, Plaintiff did not assert issues of fact that would prevent summary judgment on the Eleventh Amendment. Thus, there was no reason, under then-existing Third Circuit law, to develop a factual record in support of Eleventh Amendment immunity.

This Court has consistently held that the plaintiff, as the party asserting jurisdiction, bears the burden of establishing jurisdiction, *Kokkonen v. Guardian Life Insurance Company of America*, 114 S. Ct. 1673, 1675 (1994); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182, 189 (1936), as well as the burden of showing genuine issues of material fact in opposing summary judgment, *see, e.g., Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49 (1986). The Third Circuit's new standard shifting that burden to the defendant, at least in the context of summary judgment, is flatly inconsistent with these long-established burdens.

7(...continued)
not be a party to the case. This concession was formalized on the record on February 25, 1994, when Christy filed an Amended Complaint **deleting** the Turnpike Commission as a party. However, plaintiff did continue to assert claims against individual defendants in their official capacity. Subsequently, Christy was permitted to add the Commission back as a defendant in a second Amended Complaint.

2. The Third Circuit's Refusal To Remand For Development Of A Factual Record Reflects A Serious Conflict With The Manner In Which Other Circuits Give Parties An Opportunity To Comply With A New Rule On Burden Of Proof

Where Courts of Appeals change the standards applicable to the issues on appeal, the proper practice is to remand the matter to the district court to apply the new standard, and, where appropriate, develop the record. For example, in *Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225 (4th Cir. 1993), the court remanded the issue of whether attorneys fees should be awarded based on standards that the appeals court enunciated for the first time:

> [T]his court has not heretofore specifically addressed the standard a district court should apply in exercising its discretion to award attorneys' fees and costs under §505. We now take this opportunity to do so. * * * Although the district court [considered the attorneys' fee issue], it did not have the benefit of our holding today establishing the factors that should be considered in making this determination. We therefore remand for the district court to consider whether an award to Arete under §505 is appropriate under this standard.

Id. at 234 (footnote omitted).

Similarly, in *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642 (10th Cir. 1988), the court affirmed summary judgment on several claims, but remanded the qualified immunity claim after discussing how Supreme Court caselaw should be applied in instances where the substantive claim involves elements of subjective intent. *Id.* at 648-50.

The court concluded that "[b]ecause the standard we apply today had not been announced when the district court denied the defendants' motion in this case," the case would be remanded for further fact-finding. *Id.* at 650.

Courts of Appeals take the same approach where the applicable law or standards of proof for the issues on appeal have been changed by the Supreme Court, by legislation, or by other sources.[8] In these instances, Courts of Appeals have remanded the matters to the district courts to develop and apply facts under the new law or standard. *See, e.g., Satcher v. Honda Motor Co., Ltd.*, 993 F.2d 56, 57 (5th Cir. 1993)(state supreme court opinion changing product liability standards required remand to district court to apply new standards, rather than having appellate court apply the new law in review); *Smith v. Cooper/T. Smith Corp.*, 886 F.2d 755, 756 (5th Cir. 1989)(where the Supreme Court changed the standard for proof of a "pattern" in a RICO claim, case was remanded to district court for further findings under the new standard); *Perez v. Simmons*, 884 F.2d 1136, 1143 (9th Cir. 1988)(newly announced standard from Supreme Court on §1983 claims based on inadequate police training changed the standard of proof, and therefore remand to district court was appropriate); *Rengers v. WCLR Radio Station*, 857 F.2d 363, 366 (7th Cir. 1988)(where a standard for willfulness under ADEA was changed, issue was remanded to the district court for further fact-finding under the new standard); *Wilkins v. University of Houston*, 695 F.2d 134, 135 (5th Cir. 1983)(where Supreme Court had changed the standard of review for class certification and remanded the matter to the circuit level, court of appeals remanded back to district court to apply the new standard); *Bell*

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8 In *EEOC v. Westinghouse Elec. Corp.*, 925 F.2d 619, 631 (3d Cir. 1991), the Third Circuit acknowledged this general rule, but refused to remand that case for other reasons.

v. Manson, 590 F.2d 1224, 1226 (2d Cir. 1978)(noting that the caselaw on the standard applicable to searching pretrial detainees had developed since the district court opinion, the court of appeals remanded to give the moving party the opportunity to establish facts in support of its summary judgment motion); *Huecker v. Milburn,* 538 F.2d 1241, 1246 (6th Cir. 1976) (award of attorneys fees based on a standard subsequently repudiated was vacated and case was remanded for additional fact-finding under new standard). As stated by the Fifth Circuit in *Concerned Citizens of Vicksburg v. Sills,* 567 F.2d 646 (5th Cir. 1978):

> An appellate court "is obligated to take notice of changes in fact or law occurring during pendency of a case on appeal which would make a lower court's decision, though perhaps correct at the time of its entry, operate to deny litigants substantial justice. *Hawkes v. IRS,* 467 F.2d 787, 793 (6th Cir. 1972). In such cases, "where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the district court an opportunity to pass on the changed circumstances." *Korn v. Franchard Corp.,* 456 F.2d 1206, 1208 (2d Cir. 1972).

567 F.2d at 649-50.

This well-established practice should have been utilized in this case in light of the fact that the court of appeals admittedly imposed a burden of proof as an issue of first impression. Indeed, the defendants specifically requested that if the Court was not willing to grant Eleventh Amendment immunity on the facts of record, that it remand the case so that the record can be completed. The refusal of the third Circuit to remand this matter is directly inconsistent with the long-

standing practice, and effectively denies petitioners the opportunity to have their Eleventh Amendment immunity fully considered prior to trial.

Plaintiff never asserted any factual issues on Eleventh Amendment immunity in opposition to summary judgment, either as to the Commission itself or any individual defendants in their official capacity, as was his burden under F. R. Civ. P. 56. On March 9, 1994, when the district court issued a Memorandum and Order ruling *inter alia,* that the Turnpike Commission was not entitled to Eleventh Amendment immunity, there was no factual record, and there had been no briefing, on the burden of proof issue by any party. Petitioners contend that after *Hess,* the court below erred in putting the burden on the defendants, but even assuming arguendo the correctness of that holding, Petitioners should have the opportunity to present facts on the record to meet the newly articulated burden that Eleventh Amendment immunity should apply in this case.

CONCLUSION

For the reasons stated above, it is respectfully submitted that Certiorari be granted in this case.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES CHRISTY	:	CIVIL ACTION
	:	
vs.	:	NO. 93-3346
	:	
PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN BOSCHI, VINCENT GRECO and JOHN STEWART	:	

MEMORANDUM AND ORDER

JOYNER, J. March , 1994

By way of the motions presently before the Court, the defendants in this civil action seek the entry of summary judgment in their favor on all counts of the plaintiff's complaint against them. For the reasons set forth in the following paragraphs, the motions are denied.

I. STATEMENT OF RELEVANT FACTS

On June 22, 1993, the plaintiff, Charles Christy, commenced this case against the Pennsylvania Turnpike Commission and its individual commissioners and personnel committee members pursuant to 42 U.S.C. §§1983 and 1985 and for the common law tort of intentional infliction of

emotional distress for the defendants' alleged failure/refusal to give him a promotion solely on political grounds.[1]

According to the pleadings, the plaintiff has been employed by the Turnpike Commission since 1976 in various positions and has been employed since 1983 as an Auto Mechanic 1. On November 4, 1992, the Commission posted a job vacancy notice for the position of Paint Crew Foreman. Charles Christy subsequently applied for that position and on January 19, 1993, he was interviewed therefor by the defendants Boschi, Greco and Stewart. Although the pleadings and the record in this matter are silent as to the number of applicants who applied for the paint crew foreman job, it appears that the plaintiff was one of three final candidates found to be qualified by Boschi, Greco and Stewart and whose name was forwarded on to the commission's personnel committee for consideration. According to the plaintiff, regardless of the fact that he was the most qualified person for the job, the paint crew foreman position was awarded to one Sean Pilecki, who had only been employed by the Commission for the preceding 4 and 1/2 years but whose father, George Pilecki, had political ties to various high-ranking officials of the Philadelphia County branch of the Democratic Party. Plaintiff further alleges that he was also turned down for political reasons when he applied for the position of Eastern Division Equipment Supervisor in early 1993.

In response to the plaintiff's allegations of political bias, the defendants first content that they made their hiring decisions on the basis of which candidate was the most and

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1 It should be noted that on February 4, 1994, this court granted plaintiff leave to file an amended complaint, the substance of which essentially operates to clarify the parties and facts underlying his causes of action without significantly altering the character of this action.

best qualified person for the job(s) for which the applications were being made. In addition, Defendants have raised a number of affirmative defenses to the plaintiff's lawsuit, including the defense of immunity from suit.

II. DISCUSSION

A. Legal Principles Applicable to Summary Judgment Motions.

Fed.R.Civ.P. 56(c) prescribes the appropriate principles to be applied by the district courts in determining motions for summary judgment. That rules states, in pertinent part:

> ...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Under this rule, the courts must look beyond the bare allegations of the pleadings to ascertain if they have sufficient factual support to warrant their consideration at trial. Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C.Cir. 1988), cert. denied, 488 U.S. 825, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988). In making this determination, all of the facts must be viewed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of that party as well. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); U.S. v.

Kensington Hospital, 760 F.Supp. 1120, 1126-1127 (E.D.Pa. 1991).

This is not to say, however, that the non-moving party may rest upon the allegations contained in his or her pleading in defense of a summary judgment motion. To the contrary, Fed.R.Civ.P. 56(e) states:

> When a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Thus, while the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, the non-movant must then establish the existence of each element of its case. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3rd Cir. 1990), cert. denied, 499 U.S. 921, 111 S.Ct. 1313, 113 L.Ed.2d 247 (1991). In other words, for a plaintiff to avoid summary judgment, there must be sufficient evidence from which a jury could find for the plaintiff. Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 248, 106 S.Ct. at 2510; Laidley v. McClain, 914 F.2d 1386, 1390 (10th Cir. 1990).

B. Defendants' Entitlement to Immunity from Suit Under the Eleventh Amendment to the U.S. Constitution

At the outset, the defendants allege that they are entitled to the entry of judgment in their favor as a matter of law by virtue of the immunity provisions contained in the Eleventh Amendment to the U.S. Constitution. Specifically, that Amendment reads:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Nevertheless, there are two methods by which a state's eleventh amendment immunity may be overcome. First, Congress may explicitly legislate to abrogate this immunity; and second, the state may voluntarily waive its eleventh amendment immunity. McConnell v. Adams, 829 F.2d 1319, 1328 (4th Cir. 1987). Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court. Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., ___U.S.___, 113 S.Ct. 684, 687-688, 121 L.Ed.2d 605 (1993). This principle applies with equal force to bar a civil rights suit in federal court that names the state or a state department or agency having no existence apart from the state as a defendant. See: Laskaris v. Thornburgh, 661 F.2d 23, 25 (3rd Cir. 1981), cert. denied, 469 U.S. 886, 105 S.Ct. 260, 83 L.Ed.2d 196 (1984); Jiminez v. Lakelands Racing Association, Inc., 567 F.Supp. 1298, 1301 (W.D.Pa. 1983).

The Supreme Court, however, has held that Congress did not intend by the general language of Section 1983 to override the traditional sovereign immunity of the States and, as the provisions of 42 Pa.C.S.A. §8521 make clear, the Commonwealth of Pennsylvania has not consented to waive its eleventh amendment immunity:

> (a) **General rule.**--Except as otherwise provided in this subchapter, no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa.C.S.§2310 (relating to sovereign immunity reaffirmed; specific waiver) or otherwise.
>
> (b) **Federal courts.**-- Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.

Quern v. Jordan, 440 U.S. 332, 342, 99 S.Ct. 1139, 1145, 59 L.Ed.2d 358 (1979).

In those cases where the bar of the eleventh amendment is raised and there has been no waiver of the immunity arising thereunder, it thus becomes incumbent upon the Court to ascertain whether or not the agency raising the defense has a sufficiently close nexus with the state to render it immune from suit as well. Whether or not an agency or instrumentality is the alter ego of the state and, therefore, immune from suit by virtue of the eleventh amendment is a question of federal, not state law and turns upon facts widely varient from case to case. Smith v. New Jersey Transit Corp., 691 F.Supp. 888, 889 (E.D.Pa. 1988); Harris v. Pennsylvania Turnpike Commission, 410 F.2d 1332, 1337 (3rd Cir. 1969), cert. denied, 396 U.S. 1005, 90 S.Ct. 558, 24 L.Ed.2d 497 (1970). However, state decisions concerning the relationship of an agency to the state may be an important, and under certain circumstances, a controlling factor in the determination of immunity. Blake v. Kline, 612 F.2d 718, 722 (3rd Cir. 1979), cert. denied, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1112 (1980).

In this regard, several courts have reasoned that the state is the real party in interest when the action seeks an award of money that will come from the state treasury. Savage v. Commonwealth of Pennsylvania, 475 F.Supp. 524, 531 (E.D.Pa. 1979), aff'd, 620 F.2d 289 (3rd Cir. 1980), citing, inter alia, Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945); DiPietro v. The Garden State Racing Association, 463 F.Supp. 574, 576 (E.D.Pa. 1978). Other factors worthy of consideration include: (1) whether the agency is performing a governmental or propriety function; (2) how local law defines the status and nature of the agency; (3) the degree of autonomy exercised by the agency over its own operations; (4) whether the agency's property is immune from state taxation; (5) whether the agency has been separately incorporated; (6) whether the agency has the power to sue and be sued and enter into contracts; and (7) whether the sovereign has immunized itself from responsibility for the agency's operations. Smith v. New Jersey Transit Corp., supra; Blake v. Kline, supra; Urbano v. Board of Managers of New Jersey State Prison, 415 F.2d 247, 250-251 (3rd Cir. 1969), cert. denied, 397 U.S. 948, 90 S.Ct. 967, 25 L.Ed.2d 129 (1970). See Also: Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401, 99 S.Ct. 1171, 1177-1178, 59 L.Ed.2d 401 (1979); Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey, 819 F.2d 413, 414 (3rd Cir. 1987), cert. denied, 484 U.S. 953, 108 S.Ct. 344, 98 L.Ed.2d 370 (1987). In close cases, evidence beyond the mere statutory language is required to determine the issue. Smith v. New Jersey Transit Corp., supra, at 889; Blake v. Kline, 612 F.2d at 726.

Regrettably, the issue of whether or not the Pennsylvania Turnpike Commission is an arm or alter ego of the Commonwealth of Pennsylvania is far from clear. It is noteworthy that of those state courts which have considered the

question in recent years and found the commission to in fact be a "Commonwealth Party" have found it be such a party within the meaning of Pennsylvania's sovereign immunity statute, 42 Pa.C.S.A. §8522. See: Smith v. Mognet, 152 Pa.Cmwlth. 302, 618 A.2d 1215 (1992); Pennsylvania Turnpike Commission v. Jellig, 128 Pa.Cmwlth. 171, 563 A.2d 202 (1989), alloc. denied, 525 Pa. 606, 575 A.2d 571 (1990) and Bradley v. Pennsylvania Turnpike Commission, 121 Pa.Cmwlth. 51, 550 A.2d 261 (1988). See Also: Toombs v. Manning, 835 F.2d 453 (3rd Cir. 1987). There have, however, been several U.S. District Court opinions addressing the precise issue with which we are here presented and the Pennsylvania Supreme Court did address the question of whether or not the Turnpike Commission is cloaked with eleventh amendment immunity in Specter v. Commonwealth of Pennsylvania, 462 Pa. 474, 341 A.2d 481 (1975). Although those decisions pre-dated the 1974 and 1985 amendments to the Turnpike Organization, Extension and Toll Road Conversion Act, 36 P.S. §651.1, et. seq. and the Specter decision was issued by a plurality of the Court, careful analysis of the present Act's language suggests to this Court that those courts were correct in concluding that the Pennsylvania Turnpike Commission is not the alter ego of the Commonwealth of Pennsylvania as a matter of federal law and is not entitled to wear the cloak of eleventh amendment immunity from suits such as the one at bar. See, e.g.: Litton RCS, Inc. v. Pennsylvania Turnpike Commission, 376 F.Supp. 579 (E.D.Pa. 1974), aff'd, 511 F.2d 1394 (3rd Cir. 1975); Sherman v. Ulmer, 201 F.Supp. 660 (E.D.Pa. 1961); Linger v. Pennsylvania Turnpike Commission, 158 F.Supp. 900 (D.Pa. 1958). See Also: Sarteschi v. Burlein, 508 F.2d 110 (3rd Cir. 1975); Pennsylvania Turnpike Commission v. County of Fulton, 195 Pa.Super. 517, 171 A.2d 882 (1961).

The Pennsylvania Turnpike Commission was created and exists pursuant to 36 P.S. §652d. Although the language

of that statute does not address all of the above-referenced criteria, it does state that "the commission is...constituted an instrumentality of the Commonwealth and the exercise by the commission of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed and held to be an essential governmental function of the Commonwealth." In addition, "the commission ... consist[s] of five members..., [and] the Secretary of Transportation shall be a member ex officio [but] may authorize the Deputy Secretary of Highway Administration to act in his place, including the power to vote on any issue. The four remaining members shall be appointed by the Governor by and with the advice and consent of two-thirds of the members of the Senate..."

Section 652d goes on to state that "The commission shall make necessary rules and regulations for its own government and shall have the power to acquire, own, use, hire, lease, operate and dispose of personal property, real property and interests in real property, and to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act...All such compensation and salaries and all expenses incurred in carrying out the provisions of this act shall be paid solely from funds provided under the authority of this act, and no liability or obligation shall be incurred hereunder beyond the extent to which money shall have been provided under the authority of this act..."

The commission's powers and duties are reiterated at 36 P.S. §651.7(a); the gubernatorial appointment process for commission members is repeated at 36 P.S. §651.5. Finally §651.6 reaffirms that the exercise by the turnpike commission of the powers granted to it under the act constitute "an essential

governmental function of the Commonwealth." In addition, §651.7 further provides that the commission is authorized to:

> (1) Maintain a principal office at such place as shall be designated by the commission.
>
> (2) Contract and be contracted within its own name.
>
> (3) Sue and be sued, in its own name, plead and be impleaded. Any and all actions at law or in equity against the commission shall be brought only in the courts in which such actions may be brought against the Commonwealth.
>
> (4) Have an official seal.
>
> (5) Make necessary rules and regulations for its own government.
>
> (6) Acquire, hold, accept, own, use, hire, exchange, operate and dispose of personal property, real property and interests in real property, and to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, and to employ engineering, traffic, architectural and construction experts and inspectors, attorneys and other employees as may in its judgment be necessary and fix their compensation.
>
> (7) Provide grade separations, at its own expense, with respect to all public roads, State highways and interstate highways intersected by the turnpikes and to change and adjust the lines and grades thereof so as to accommodate the same to the design for such grade separation. The damages incurred in changing and

> adjusting the lines and grades of public roads, State highways and interstate highways shall be ascertained and paid by the commission....If the commission shall find it necessary to provide a grade separation or change the site of any portion of any interstate highway, State highway or public road or vacate the same, it shall cause to be reconstructed and restored forthwith, at the commission's own expense...
>
> (8) Petition the court of common pleas of the county wherein is situate any public road, or part thereof affected by the location therein of the turnpikes, for the evacuation, relocation, or supply or the same or any part thereof...

What's more, under 36 P.S. §651.15, "...the commission shall not be required to pay any taxes or assessments on any property acquired or used by it for the purposes provided in this act, and the bonds, notes or other obligations issued by the commission, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation within the Commonwealth." Finally, as is reflected by 36 P.S. §§651.2, 651.4, 651.12, 651.13, and 651.16, the turnpike commission and all of its authorized activities are to be funded and paid for from the tolls and revenues which the commission raises from the issuance and sale of bonds and notes and, as §651.4 makes clear, the obligations, debts, etc. of the turnpike commission are <u>not</u> to be deemed a debt of or a pledge of the faith and credit of the Commonwealth of Pennsylvania. Thus, while the Pennsylvania legislature deems the commission an instrumentality of the Commonwealth and considers the activities of the commission to be essential governmental functions and the Governor is responsible for appointing the members of the Commission, it is nevertheless clear that in all other respects the turnpike

commission functions independently of state interference. Accordingly, and inasmuch as the present language of the Turnpike Commission Act is substantially identical to the language of the Act analyzed by the Pennsylvania Supreme Court in Specter, we see no reason to now depart from its rationale. We therefore conclude that the Pennsylvania Turnpike Commission is not, as a matter of federal law, a part of the Commonwealth of Pennsylvania and that it is not immune from this lawsuit under the Eleventh Amendment.

C. The Individual Defendants' Immunity From Suit Under the Doctrine of Qualified Immunity

The individual defendants, Brady, Boschi, Greco and Stewart next assert that they are entitled to the entry of judgment in their favor as a matter of law inasmuch as they are qualifiedly immune from suit.

It is axiomatic that qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982) citing Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). The general rule of qualified immunity is intended to provide government officials with the ability to reasonably anticipate when their conduct may give rise to liability for damages and, where applicable, officials can now that they will not be held personally liable as long as their actions are reasonable in light of current American law. Anderson v. Creighton, 483 U.S. 635, 646, 107 S.Ct. 3034, 3042, 97 L.Ed.2d 523 (1987). Qualified immunity may thus be properly invoked to protect governmental officials performing discretionary functions to the extent that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow, 457 U.S. at 818, 102 S.Ct. at

2738; Winn v. Lynn, 941 F.2d 236, 239 (3rd Cir. 1991). See Also: Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985). Clearly established rights are those with contours sufficiently clear that a reasonable official would understand that what he is doing violates those rights. Hence, while a plaintiff need not show that the very action in question has previously been held unlawful, he need to show that in light of preexisting law, the unlawfulness was apparent. Shea v. Smith, 966 F.2d 127, 130 (3rd Cir. 1992) citing Anderson v. Creighton, supra, 107 S.Ct. at 3039.

For purposes of determining whether a right is clearly established, the court must look to the status of the law at the time of the challenged actions. Burns v. County of Cambria, 971 F.2d 1015, 1024 (3rd Cir. 1992), cert. denied, ___U.S.___, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993). Naturally, a necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991); D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1368 (3rd Cir. 1992), cert. denied, ___U.S.___, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993).

Here, the essential thrust of the plaintiff's case is that his first amendment rights to free speech and free association were violated by the defendants by their failure to promote him for purportedly unlawful partisan political reasons. It is therefore fairly obvious that Mr. Christy is indeed asserting the violation of a constitutional right.

Moreover, and as discussed below, it has long been established that conditioning hiring decisions on political belief

and association plainly constitutes an unconstitutional condition unless it can be shown that party affiliation is an acceptable criterion for some type of government employment or that an employee's private political beliefs would interfere with the discharge of his public duties. In that event, an employee's First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574 (1980); Elrod v. Burns, 427 U.S. 347, 362-363, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976). In 1990, in deciding Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 2739, 111 L.Ed.2d 52 (1990), the U.S. Supreme Court extended this rationale to apply with equal force to promotional decisions thereby prohibiting partisan or political considerations from having any influence in the promotional process. Again, it is clear that this was the prevailing state of the law in 1992 and 1993 when the employment decisions at issue in this case were made.

Furthermore, it is evident from the Turnpike Commission's Policy Letter (attached as Exhibit 21 to the plaintiff's response to the instant motions) and from the deposition testimony of John Boschi (at page 25), Vincent Greco (at pages 25-26) and John Stewart (at pages 37-41), that the defendants, like all others involved in the promotion process, had been specifically apprised of the Supreme Court's holding in Rutan. Inasmuch as our review of the record in this case reveals and Messrs. Boschi, Greco and Stewart admit that they were responsible for interviewing, assessing and "grading" candidates for the position(s) for which Mr. Christy applied, and that Mr. Brady, together with this fellow commission members, voted to approve the appointment of Sean Pilecki, it is clear that defendants were all involved in the promotions process in this case. Accordingly, viewing all of the evidence in this matter in light of the foregoing precedent an din the

manner most favorable to the plaintiff, we are unable to find as a matter of law that these defendants did not violate Mr. Christy's clearly established rights or that they are entitled to the cloak of qualified immunity from this suit. The motions for summary judgment on the basis of qualified immunity from suit must therefore be denied.

D. Sufficiency of the Evidence of Record to Demonstrate a Violation of Plaintiff's First Amendment Rights

Defendants next assert that the plaintiff simply cannot prove that his First Amendment rights were violated so as to entitle him to the recovery of monetary damages under 42 U.S.C. §1983. Again, we disagree.

It is well-settled that the freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments and that conditioning hiring, firing and promotional decisions on political belief and association plainly constitute an unconstitutional infringement of this right which is actionable under the federal civil rights acts. Rutan v. Republic Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 2738-2739, 111 L.Ed.2d 52 (1990); Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 2681, 49 L.Ed.2d 547 (1976).

These individual rights, however, are not absolute and restraints will therefore be permitted for appropriate reasons. Id., 96 S.Ct. at 2683. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. Branti v. Finkel, 445 U.S. 507, 517, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574 (1980), citing Elrod, 427 U.S. at

366, 96 S.Ct., at 2686. In this regard, the courts have held that "a nonpolicymaking, nonconfidential government employee" cannot be discharged on the sole ground of his or her political beliefs but that an employee who "acts as an advisor or formulates plans for the implementation of broad goals" may be discharged upon a proper showing. Zold v. Township of Mantua, 935 F.2d 633, 635 (3rd Cir. 1991) citing Elrod, 427 U.S. at 367-368, 375, 96 S.Ct. at 2686-2687, 2690; Brown v. Trench, 787 F.2d 167, 168 (3rd Cir. 1986).

Of course, it is not always easy to determine whether political affiliation is a legitimate factor to be considered for a particular job and each decision is naturally fact specific for that case. Zold, at 635, citing, inter alia, Ness v. Marshall, 660 F.2d 517, 522 (3rd Cir. 1981). Although it has been held that in constitutional terms, freedom of association is not to be defined unreservedly and hence entry into the constitutional orbit requires more than a mere relationship, protected political beliefs and associations are not confined to partisan beliefs and associations. Boger v. Wayne County, 950 F.2d 316, 323 (6th Cir. 1991); Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 57 (1st Cir. 1990). Indeed, "political affiliation" has been held to apply to political differences of any kind, not merely differences in party membership. Boger, at 323. Regardless of the type of association involved, however, all employees who claim that adverse employment action was taken against them based upon the exercise of their associational rights must show that they were engaged in constitutionally protected conduct and that that conduct was a substantial or motivating factor in the government employer's decision. Rode v. Dellarciprete, 845 F.2d 1195, 1204 (3rd Cir. 1988); Asko v. Bartle, 762 F.Supp. 1229, 1231 (E.D.Pa. 1991), both citing Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977).

Viewing the record in the instant case in light of the above-referenced principles, we observe at the outset that at the time Charles Christy applied for the paint crew foreman position, he had been employed by the Pennsylvania Turnpike Commission for sixteen and one-half years in various positions. At that time and apparently at the present time, Mr. Christy was and is employed as an auto mechanic at the Commission's Devault facility. There is no evidence whatsoever on this record, however, which would suggest that Mr. Christy is presently a confidential, policymaking employee or that the paint crew foreman position was such as would necessitate political loyalty or affiliation to be performed in an effective manner. Consequently, we can reach no other conclusion but that the Turnpike Commission has no overriding interest such as would justify the encroachment of Mr. Christy's First Amendment right to free association.

We next evaluate whether the record evidence demonstrates that Plaintiff was engaged in constitutionally protected conduct and whether that conduct was a substantial or motivating factor in the Commission's decision to promote another candidate. Again viewing the record in the light most favorable to the plaintiff, the testimony and affidavits of Mr. Christy himself, the affidavit and deposition of James Sperduti and the deposition testimony of John Boschi reflect that while the plaintiff had been active in Democratic party politics in Chester County, the only way he could get a promotion with the Commission was by aligning himself with defendant Robert Brady and Philadelphia County Democratic State Senator Vincent Fumo and pressuring those individuals to promote or create a higher, better paying position for him. This evidence is sufficient indicia that Mr. Christy was engaged in exercising his first amendment right to not associate or align himself with Mr. Brady and/or Senator Fumo and that his decision to not so associate or align himself with those individuals was a

substantial or motivating factor in the Commission's decision to instead promote Sean Pilecki who, along with his father, was apparently so aligned. Inasmuch as we see no difference between refusing to promote someone on the basis of who he associates with and refusing to promote someone on the basis of who he chooses not to associate with, it is the opinion of this Court that there is enough evidence in this record of a violation of Plaintiff's constitutional rights to enable this case to go to a jury.

In so holding, we further find from the affidavits and deposition testimony of defendants Brady, Boschi, Greco and Stewart and both Louis and James Sperduti that adequate evidence exists that each of the individual defendants were influentially involved in the interviewing and evaluation processes and in the making of the final employment decision being challenged in this case. To be sure, as Boschi, Stewart and Greco themselves testified, they were responsible for interviewing and evaluating the candidates. In this case, it appears that the questions asked during the interviewing process and the evaluating criteria may not have been the same for all of the candidates and that the interview evaluation forms may have been somewhat skewed as a result. (See, e.g.: excerpts from Depositions of Charles Christy, John Boschi, Louis Sperduti, James Sperduti and Sean Pilecki.)

For all of the reasons enumerated above, the defendants' motions for summary judgment are denied in accordance with the attached order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES CHRISTY	:	CIVIL ACTION
	:	
vs.	:	NO. 93-3346
	:	
PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN BOSCHI, VINCENT GRECO and JOHN STEWART	:	

ORDER

AND NOW, this day of , 1994 upon consideration of the Defendants' Motions for Summary Judgment, it is hereby ORDERED that the Motions are DENIED for the reasons set forth in the preceding Memorandum Opinion.

BY THE COURT:

_____

J. CURTIS JOYNER, J.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1386 and 94-1398

CHARLES A. CHRISTY,

vs.

PENNSYLVANIA TURNPIKE COMMISSION, A DULY ORGANIZED AND EXISTING AGENCY OF THE COMMONWEALTH OF PENNSYLVANIA; ROBERT BRADY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JAMES J. DODARO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; HOWARD YERUSALIM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; FRANK S. URSOMARSO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JAMES F. MALONE, III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN L. SOKOL, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; S. MICHAEL PALERMO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOSEPH L. DIRIENZO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; SAMUEL S. CARNABUCI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; MELVIN M. SHELTON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; DEBORAH KOVAL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; JOHN A. BOSCHI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; VINCENT J. GRECO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN A. STEWART, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; GEORGE PILECKI, INDIVIDUALLY AND IN

HIS OFFICIAL CAPACITY; SEAN PILECKI, INDIVIDUALLY

Pennsylvania Turnpike Commission, Robert Brady, Vincent Greco and John Stewart

Appellants No. 94-1386

John A. Boschi

Appellant No. 94-1398

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 93-cv-03346)
Nos. 94-1386 & 94-1398

Present: STAPLETON, ALITO, and LEWIS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 12, 1994. An Opinion and Order of this Court were entered March 27, 1995. A petition for rehearing in banc was filed April 10, 1995. By order entered April 27, 1995, the Court granted panel rehearing, vacated the original Opinion and Judgment, and dismissed the petition for rehearing in banc as moot, without prejudice to the filing of a new application for rehearing in banc, pending issuance of another Judgment disposing of the within appeals. The cause was submitted pursuant to LAR 34.1(a) on April 28, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 10, 1994, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: May 23, 1995

Filed May 23, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1386 and 94-1398

CHARLES A. CHRISTY,

v.

PENNSYLVANIA TURNPIKE COMMISSION, A DULY ORGANIZED AND EXISTING AGENCY OF THE COMMONWEALTH OF PENNSYLVANIA; ROBERT BRADY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JAMES J. DODARO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; HOWARD YERUSALIM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; FRANK S. URSOMARSO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JAMES F. MALONE, III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN L. SOKOL, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; S. MICHAEL PALERMO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOSEPH L. DIRIENZO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; SAMUEL S. CARNABUCI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; MELVIN M. SHELTON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; DEBORAH KOVAL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; JOHN A. BOSCHI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; VINCENT J. GRECO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN A. STEWART, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; GEORGE PILECKI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; SEAN PILECKI, INDIVIDUALLY

Pennsylvania Turnpike Commission, Robert Brady, Vincent Greco and John Stewart,

Appellants No. 94-1386

John A. Boschi,

Appellant No. 94-1398

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 93-cv-03346)

ARGUED SEPTEMBER 12, 1994

OPINION VACATED APRIL 27, 1995

SUBMITTED PURSUANT TO LAR 34.1(a)
ON PANEL REHEARING APRIL 28, 1995

BEFORE: STAPLETON, ALITO and LEWIS,
Circuit Judges.

(Filed May 23, 1995)

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OPINION OF THE COURT

LEWIS, *Circuit Judge.*

In this case, we must determine whether the Pennsylvania Turnpike Commission ("Commission") is an "arm" or "alter ego" of the Commonwealth of Pennsylvania and thus entitled to Eleventh Amendment immunity from suit in federal court. Because we conclude that the Commission is not an arm or alter ego of Pennsylvania we will affirm the district court's finding that the Commission does not enjoy Eleventh Amendment sovereign immunity.

I.

The appellee, Charles Christy ("Christy"), has been an employee of the Commission since 1976.[1] In November of 1992, Christy made application for the position of Paint Crew Foreman. He was interviewed for this position in early 1993 by the appellants John Boschi, Vincent Greco and John Stewart.[2] Christy was then chosen as one of three final candidates for the Paint Crew Foreman position. The names of the three final candidates were passed to the Commission's personnel committee for final review. The personnel committee then recommended that the position

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1. Since 1983, Christy has been employed as an Auto Mechanic 1.

2. John Boschi is currently the Commission's Deputy Executive Director of Maintenance; Vincent Greco is Eastern Division Superintendent of the Commission; and John Stewart is Assistant Deputy Executive Director of Maintenance for the Commission. The other individual defendant in this appeal, Robert Brady, is a Turnpike Commissioner.

be awarded to one Sean Pilecki, a Commission employee during the preceding four and a half years. The Commission adopted the personnel committee's recommendation and hired Mr. Pilecki. Christy subsequently applied and was turned down for the position of Eastern Division Equipment Supervisor.

Christy then sued the Commission and its individual commissioners and personnel committee members pursuant to 42 U.S.C. §§ 1983 and 1985, claiming that he was not promoted due to political bias against him. In response to Christy's claims of political bias, the Commission and individual defendants Brady, Greco and Stewart filed a joint motion for summary judgment, while the defendant Boschi filed a separate summary judgment motion. The district court denied the defendants' motions, ruling as a matter of law that the Commission was not entitled to Eleventh Amendment immunity, and rejecting the individual defendants' claims of qualified immunity. These appeals followed.

II.

The district court had jurisdiction in this case pursuant to 28 U.S.C. §§ 1343(a)(3) and 1367(a).[3] We have appellate

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3. The Commission argues that the district court lacked subject matter jurisdiction over it because Christy had elected to drop the Commission as a party by the time the district court ruled on the Eleventh Amendment issue. Putting aside the question whether or not Christy in fact effectively dropped the Commission as a party, the Commission is incorrect in asserting that the district court lacked subject matter jurisdiction over it at the time the court ruled on the Eleventh Amendment issue. Christy sued the individual defendants in both their individual and official capacities. A suit against an individual in his or her official capacity is no different from a suit against that individual's office. "As such, it is no different from a suit against" the office itself. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (citations omitted); *see also Kentucky v. Graham*, 473 U.S. 159 (1985) (emphasizing that official capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" (citation omitted)). In this case, a suit against the individual defendants in their official capacities is the same as a suit

jurisdiction pursuant to 28 U.S.C. § 1291 over the district court's denial of the defendants' motions for summary judgment on Eleventh Amendment and qualified immunity grounds. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, ___ U.S. ___, ___, 113 S. Ct. 684, 687-89 (1993) (Eleventh Amendment immunity); footnote 4, *infra* (qualified immunity). We exercise plenary review of the district court's denial of the defendants' motions for summary judgment. *Rappa v. New Castle County*, 18 F.3d 1043, 1050 (3d Cir. 1994).[4]

III.

We must determine whether the district court correctly concluded that the Commission is not an "arm" of Pennsylvania and therefore not entitled to sovereign immunity under the Eleventh Amendment.[5] The question

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against the Commission. The individual defendants have asserted Eleventh Amendment immunity in relation to Christy's official capacity claims, and pressed that immunity in their summary judgment motions before the district court. Thus, the issue of the Commission's entitlement to sovereign immunity was properly before the district court at the time the court ruled on the issue.

4. The individual defendants argue that the district court erred in denying their motions for summary judgment based on qualified immunity. The plaintiff contends that we lack jurisdiction to entertain this argument because the district court's decision was based on factual rather than legal grounds. We do not agree. We will not address this question at length, however, because it appears likely that the Supreme Court will soon resolve this question in *Johnson v. Jones*, No. 94-455 (Argued April 18, 1995).

While we believe that we have jurisdiction to entertain the individual defendants' qualified immunity argument, we affirm the district court's decision on the merits. When the disputed facts are viewed in the light most favorable to Christy, as they must at summary judgment, we agree that the individual defendants were not entitled to qualified immunity.

5. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U.S. Const. amend. XI. Its explicit terms notwithstanding, the Eleventh Amendment has consistently been interpreted to immunize an unconsenting state " 'from suits brought in federal courts by her own citizens as well as by citizens of another state.' " *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984) (citation omitted).

whether the Commission is an "arm" of the State is one of federal law. *Blake v. Kline*, 612 F.2d 718, 722 (3d Cir. 1979). However, before undertaking our Eleventh Amendment analysis, we must decide a question of apparent first impression in this Circuit: who bears the burden of production and persuasion with respect to factual questions when a putative state entity claims immunity under the Eleventh Amendment? We conclude that the party asserting Eleventh Amendment immunity (and standing to benefit from its acceptance) bears the burden of proving its applicability. In so concluding, we adopt the reasoning set forth by the Court of Appeals for the Ninth Circuit in *ITSI TV Productions v. Agricultural Associations*, 3 F.3d 1289 (9th Cir. 1993). Because Eleventh Amendment immunity can be expressly waived by a party, or forfeited through non-assertion, it does not implicate federal subject matter jurisdiction in the ordinary sense. *Id.* at 1291. We agree with the Ninth Circuit that "whatever its jurisdictional attributes, [Eleventh Amendment immunity] should be treated as an affirmative defense[,]" and "[l]ike any other such defense, that which is promised by the Eleventh Amendment must be proved by the party that asserts it and would benefit from its acceptance." *Id.* We also agree with the Ninth Circuit that considerations of fairness support this conclusion. As the court noted in *ITSI TV Productions*:

> In general, a claim of Eleventh Amendment immunity will occasion serious dispute only where a relatively complex institutional arrangement makes it unclear whether a given entity ought to be treated as an arm of the state. In such cases, the "true facts" as to the particulars of this arrangement will presumably "lie particularly within the knowledge of" the party claiming immunity.

Id. at 1292 (citations omitted).

Having concluded that the party asserting Eleventh Amendment immunity bears the burden of proving entitlement to it, we turn now to the merits of the immunity question. We have on numerous occasions set forth the criteria to be considered in determining whether an entity is an "alter ego" or "arm" of a state for purposes of the

Eleventh Amendment. *See e.g., Peters v. Delaware River Port Authority*, 16 F.3d 1346, 1350 (3d Cir. 1994); *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 816-818 (3d Cir. 1991) (*in banc*); *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989) (*in banc*). Our oft-reiterated test entails three distinct inquiries: (1) whether, in the event the plaintiff prevails, the payment of the judgment would come from the state (this includes three considerations: whether the payment will come from the state's treasury, whether the agency has sufficient funds to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts); (2) the status of the agency under state law (this includes four considerations: how state law treats the agency generally, whether the agency is separately incorporated, whether the agency can sue and be sued in its own right, and whether it is immune from state taxation); and (3) what degree of autonomy the agency enjoys. *Peters v. Del. River Port Authority*, 16 F.3d 1346, 1350 (3d Cir. 1994) (*citing Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 816 (3d Cir. 1991) (*in banc*)). We turn now to this three-pronged inquiry.

A. *Funding*

We have explained that although no single factor is dispositive of the Eleventh Amendment inquiry, the "most important" factor is whether a judgment against the entity in question, in this case the Commission, would be paid out of the state treasury. *See, e.g., Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989) (*in banc*). The special emphasis we place upon the funding factor is supported by the Eleventh Amendment's central goal: the prevention of federal court judgments that must be paid out of the State's treasury. *See Fitchik*, 873 F.2d at 659-60 (*citing Edelman v. Jordan*, 415 U.S. 651 (1974)). The Supreme Court has recently reiterated the significance accorded this factor in relation to other Eleventh Amendment considerations. In *Hess v. Port Authority Trans-Hudson Corporation*, 115 S. Ct. 394 (1994), the Court explained that "prevention of federal court judgments that must be paid out of a State's treasury"

formed the "impetus" for the Eleventh Amendment. *Hess*, 115 S. Ct. at 404.

> Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations . . . . "[T]he vast majority of Circuits have concluded that the state treasury factor is the most important factor to be considered and, in practice, have generally accorded this factor dispositive weight."

Id. (citations omitted).

1. *Whether Payment Will Come from the State's Treasury*

Pursuant to the Turnpike Organization, Extension and Toll Road Conversion Act ("The Act"), 36 P.S. §§ 651.1 *et seq.*, the Commission is authorized to obtain funds through the collection of tolls for the use of the Pennsylvania Turnpike System. 36 P.S. § 651.16. The Commission is also authorized to collect rents and charges for telephone and electric lines, gas stations, garages, stores, hotels, restaurants and advertising signs. *Id.* The Act also authorizes the Commission to obtain funds through the issuance of bonds, notes and other obligations. *Id.* at § 651.12. In addition, the Act authorizes the Commission to obtain funds from the federal government. *Id.* at § 651.19. Finally, the Commission receives some funding out of Pennsylvania's oil company franchise tax collections. 75 Pa.C.S.A. § 9511(h).

The Commission notes that only one of these funding sources — tolls — is not subject to state control. According to the Commission, the state's regulation and control of the Commission's funding is crucial to our analysis of the funding factor. Also significant, according to the Commission, is the fact that upon retiring its debts, or setting aside funds sufficient to do so, the Commission is to be dissolved and all of the Commission's property is to be vested in the Department of Highways. *See* 36 P.S. § 652o.

We do not know what percentage of the Commission's funding might be attributed to each of the funding sources identified above. We are, of course, able to observe that only

one of the five available sources of funding — the oil company franchise tax — is obtained from the state. The other four sources — tolls, rents, bond and note revenues, and federal funding — are not state-derived. That four of the five established sources of the Commission's funding are not state-derived is, we think, even in the absence of additional information, some support for the conclusion that the Commission is not the alter ego of Pennsylvania.[6]

The degree of state regulation of the Commission's funding does not alter our conclusion that the funding factor weighs against according immunity to the Commission. We have explained that state control is only significant to the funding analysis where such control indicates state ownership of the funds. *Fitchik*, 873 F.2d at 661. In other words, state control over an entity's ability to obtain funds is inadequate to demonstrate state ownership of the funds where the state is not shown to have a financial interest that would be directly and adversely affected by the diminution of the funds in question. *See id.* Otherwise, the degree of state control over the entity's funding is relevant to the autonomy inquiry, which we discuss below. *Id.* Here, the state's control over the Commission's *authority to issue* bonds, notes and other obligations falls short of indicating state ownership of the funds obtained *through the issuance* of such bonds, notes and other obligations. Likewise, state control over the Commission's ability to obtain federal funding falls short of indicating state ownership of the federal funds obtained. The Commission's evidence of state control over its ability to obtain funds simply fails to show a financial interest on

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6. Although the figure does not appear in the record, the Commission has represented to us that it has received "more than $112,000,000" in oil company franchise tax revenues. (Commission brief at 36 n.18). We fail to see, however, how we can draw any conclusion from this representation, given that the Commission has failed to provide information regarding the percentage of its annual revenues received in this form. *See Bolden*, 953 F.2d at 819-20 (without knowing what percentage of SEPTA's total revenue comes from state funds under a particular new law, we held that the impact of the law on SEPTA's funding was too uncertain to be given significant weight in the funding analysis).

the part of Pennsylvania that would be directly and adversely affected by the diminution of the Commission's funds obtained through the issuance of bonds or from the federal government.

Nor is our conclusion with respect to the funding factor altered by the fact that the Commission will one day be dissolved and all its remaining funds and property vest in the Department of Highways. Pursuant to 36 P.S. § 652o:

> When all bonds and the interest thereon shall have been paid or a sufficient amount for the payment of all bonds and the interest to maturity thereon, shall have been set aside in trust for the benefit of the bondholders, and shall continue to be held for that purpose, the turnpike and the connecting tunnels and bridges shall become a part of the system of State highways, and shall be maintained by the Department of Highways free of tolls, and thereupon the commission shall be dissolved, and all funds of the commission not required for the payment of the bonds and all machinery, equipment and other property belonging to the commission, shall be vested in the Department of Highways.

36. P.S. § 652o. Thus, the dissolution of the Commission is statutorily contingent upon the Commission satisfying, or being able to satisfy, all of its debts and obligations. If anything, this provision provides further support for our conclusion by illustrating the state's reluctance to take on the Commission's financial obligations as its own.

2. *Whether the Commission Could Satisfy a Judgment Against It*

We do not know how much money the Commission has or would have available to it to satisfy a potential judgment against it. According to the Commission, the lack of record evidence on this point renders this second funding inquiry "irrelevant." We do not agree. Since the Commission bears the burden of proving its entitlement to Eleventh Amendment immunity, the Commission's failure to provide pertinent information regarding its ability, or lack thereof, to satisfy a potential judgment against it simply means that

the Commission has failed to sustain its burden of proof on this important question. Moreover, even in the absence of such evidence, our cases enable us to draw certain conclusions, with respect to the Commission's ability to pay a judgment against it. In both *Bolden* and *Fitchik*, we suggested that an entity with power to raise revenues by raising fares need not request funds from the state to meet shortfalls caused by adverse judgments. *See Bolden*, 953 F.2d at 819; *Fitchik*, 873 F.2d at 661.[7] The Commission is authorized "to fix, and to revise, from time to time," tolls for the use of the Pennsylvania Turnpike System. 36 P.S. § 651.16(a). In fact, the Commission's authority to set the toll rate "shall not be subject to supervision or regulation by any other State commission, board, bureau or agency." *Id.* at § 651.16(b). In light of *Bolden* and *Fitchik*, we think the Commission's power to raise revenue levels by increasing the toll rates, even in the absence of information regarding the Commission's financial condition and consequent ability to pay a judgment against it, supports the view that the Commission need not seek assistance from the state to satisfy a judgment against it.

3. *Whether the Sovereign has Immunized Itself*

The Act provides that "[a]ll compensation and salaries and all expenses incurred in carrying out the provisions of this act shall be paid solely from funds provided under the authority of this act . . . ." 36 P.S. § 651.8(a). Furthermore, the Act provides that all bonds, notes and other obligations issued by the Commission under the Act

> shall not be deemed to be a debt of the Commonwealth or a pledge of the faith and credit of the Commonwealth, but such bonds, notes or other obligations shall be payable solely from the revenues of the commission . . . . All such bonds, notes or other obligations shall contain a statement on their face that the Commonwealth is not obligated to pay the same or

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7. We also noted in *Fitchik*, alternatively, that the entity could cover a shortfall by reducing its expenses or capital budget. *Fitchik*, 873 F.2d at 661. Similarly, the Commission would, we imagine, be able to cover a shortfall by reducing its expenses or capital budget.

> the interest thereon except from revenues of the commission . . . and that the faith and credit of the Commonwealth is not pledged to the payment of the principal or interest of such bonds, notes or other obligations. The issuance of turnpike revenue bonds, notes or other obligations under the provisions of this act shall not directly or indirectly or contingently obligate the Commonwealth to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment.

36 P.S. § 651.4.

The Commission observes that the General Assembly of Pennsylvania has not expressly immunized the state from responsibility for *all* of the Commission's possible debts and liabilities. Nowhere in the Commission's original or subsequent enabling acts, the Commission notes, is there a provision disclaiming Pennsylvania's responsibility for the Commission's *unassumed* liabilities and obligations. One can imagine, the Commission suggests, numerous situations in which the Commission would face unassumed liabilities or debts large enough to exhaust the Commission's funds and necessitate the Commission's rescue by the Commonwealth.

In light of our case law, we do not agree that the absence of a blanket disclaimer is significant. What *is* significant under our case law is the fact that the Commission has failed to establish that Pennsylvania is under any affirmative obligation to pay the Commission's unassumed liabilities in the first place. *See Bolden*, 953 F.2d at 819 ("A state legislature might feel compelled as a practical matter to subsidize a variety of entities that provide necessary services, including financially pressed municipalities. Such discretionary subsidies committed in reaction to a judgment, however, would not necessarily transform the recipients into alter egos of the state."). Although the Commonwealth might well *choose* to appropriate money to the Commission to enable it to meet a shortfall caused by an adverse judgment, such voluntary payments by a state

.....ply "'do not trigger [Eleventh Amendment] immunity.'" *Id.* (*quoting Fitchik*, 873 F.2d at 661).[8]

The Commission has failed to establish that (1) a judgment against it would be tantamount to a judgment against the Treasury of the Commonwealth of Pennsylvania; (2) the Commission lacks financial resources sufficient to pay a potential judgment against it; or (3) Pennsylvania would be under any obligation to cover any such potential judgment against the Commission. Accordingly, on the record as it stands before us, the funding factor, the most important of the three, weighs heavily in support of the conclusion that the Commission is *not* an arm of the Commonwealth of Pennsylvania and does not enjoy Eleventh Amendment immunity from suit in federal court.

B. *Status at State Law*

The second general factor we must consider in determining whether the Commission is an arm or alter ego of the Commonwealth of Pennsylvania is the status of the Commission under Pennsylvania law. Our purpose here is to determine whether Pennsylvania law treats the Commission as an independent entity, or as a surrogate for the state. *See Fitchik*, 873 F.2d at 662.

In *Specter v. Commonwealth*, 341 A.2d 481 (1975), a plurality of the Pennsylvania Supreme Court held that the

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8. Christy contends that the Commission is able to self-insure and to purchase liability insurance, and that the Commission in fact self-insures at least part of its contingent liabilities under the Commonwealth's Employee Liability Self-Insurance Program. We have in cases past considered an entity's ability to obtain insurance as evidence of that entity's financial self-sufficiency and independence from the state. *See Bolden*, 953 F.2d at 819; *Fitchik*, 873 F.2d at 661. The Commission counters that the alleged fact of the Commission's self-insurance is not in evidence noting that "[n]o record reference is offered [by Christy], nor does any affidavit, deposition excerpt, or document included in the record support this statement." (Commission reply at 19 n.14). But the Commission overlooks the fact that it bears the burden of proving entitlement to Eleventh Amendment immunity; its failure to provide evidence of an *inability* to obtain insurance is our primary concern, not Christy's failure to cite record evidence to the contrary.

...nmission is not an arm of the Commonwealth and not entitled to sovereign immunity. After examining the legislative acts creating the Commission and defining its purposes and powers, as well as judicial decisions in which the Commission's status was at issue, the court explained that:

> There is, of course, no doubt that the Commonwealth itself could have constructed the Turnpike in the same manner that it constructs and operates its State highways. Had it done so, the State's immunity from suit would encompass actions arising in connection with the Turnpike. But the Commonwealth itself did not build *this* highway and does not maintain it. The legislature created this separate body and at the same time disclaimed any responsibility on the part of the Commonwealth for liabilities which it, the Commission, might incur. It is clear that the Commission is not an integral part of the Commonwealth, and cannot share the attributes of sovereignty which inhere in the state. It follows that the Commission is not immune from suit in tort for the acts of its servants and agents acting in the course of their employment or agency.

Id. at 491 (emphasis in original).

The Commission does, we recognize, possess certain attributes associated with sovereignty. For example, the Commission (1) may exercise the power of eminent domain; *see* 36 P.S. §§ 651.9 – .11; (2) enjoys statutory immunity from suit in state court; *see* 42 Pa.C.S.A. § 8522(a); and (3) is exempt from all state property taxation; *see* 36 P.S. § 651.15. On the other hand, the Commission possesses certain traits not at all characteristic of an arm of the state; for example, the Commission may sue and be sued in its own name; *see* 36 P.S. § 651.7(a)(3); and has the power to enter into contracts in its own name; *see* 36 P.S. § 651.7(a)(2).

On balance, the "status under state law" factors weigh slightly in favor of the conclusion that the Commission is *not* an arm of the Commonwealth of Pennsylvania. This is true, especially in light of the plurality holding of the Pennsylvania Supreme Court in *Specter* that the

Commission is *not* an integral part of the Commonwealth, and thus cannot share the attributes of sovereignty which inhere in the state. *Cf. Peters*, 16 F.3d at 1351 (holding that the Delaware River Port Authority's status under state law weighs in favor of the conclusion that the agency does not enjoy sovereign immunity, especially in light of a Pennsylvania Supreme Court case holding that the DRPA is not "'an integral part of the Commonwealth of Pennsylvania'" (citation omitted)).

The Commission contends that in enacting Pennsylvania's sovereign immunity statute, *see* 42 Pa.C.S.A. §§ 8501 *et seq.*, the Pennsylvania legislature "conclusively repudiated" *Specter*'s conclusion that the Commission is separate and apart from the Commonwealth. The Commission further notes that in two unanimous, post-*Specter*, decisions, the Pennsylvania Commonwealth Court confirmed that the Commission enjoys sovereign immunity. *See Pennsylvania Turnpike Commission v. Jellig*, 563 A.2d 202 (Pa.Cmwlth. 1989); *Bradley v. Pennsylvania Turnpike Commission*, 550 A.2d 261 (Pa.Cmwlth. 1988). To accord *Specter* any deference, the Commission argues, is to give *Specter* value already taken away by the Pennsylvania legislature and judiciary.

We do not share the Commission's appraisal of *Specter*'s continued vitality. Passage of the Pennsylvania sovereign immunity statute has not diminished the significance of *Specter*'s analysis to our assessment of the Commission's claim of entitlement to Eleventh Amendment immunity. By enacting an immunity statute pursuant to which the Commission is accorded sovereign immunity, the Pennsylvania legislature did not "conclusively repudiate" *Specter*'s conclusion that the Commission is not an integral part of the Commonwealth and does not share the attributes of sovereignty inhering in the state. In enacting the sovereign immunity statute, the Pennsylvania legislature merely conferred upon entities such as the Commission by way of statute that which they otherwise lacked, namely, immunity from suit in state court. We implied as much in *Toombs v. Manning*, 835 F.2d 453 (3d Cir. 1987), in which we explained that

> [t]he significance to our analysis of the legislature's inclusion of the . . . Commission as an immune agency is that it is clear that the General Assembly intended to provide sovereign immunity protection not only for those entities which before *Mayle[v. Pennsylvania Department of Highways*, 388 A.2d 709 (1978) (in which the Pennsylvania Supreme Court abrogated sovereign immunity)] had been immune as sovereigns, *but also for those entities not previously immune*, but which now came within the statute's scope.

Toombs, 835 F.2d at 459 (footnote omitted) (emphasis supplied). Nor do *Jellig* and *Bradley* undermine the continuing validity of *Specter's* analysis. In those cases, the Pennsylvania Commonwealth Court merely applied the Pennsylvania sovereign immunity statute to find, unremarkably, that the Commission enjoys sovereign immunity from suit in state court. *See Jellig*, 563 A.2d at 205; *Bradley*, 550 A.2d at 263.[9]

C. *Autonomy*

The Commission's membership is controlled by the executive and legislative branches of the Commonwealth. One member of the five-person Commission must always be the Secretary of Transportation, a cabinet-level position

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9. We recognize that the Pennsylvania sovereign immunity statute itself is some evidence of the Commission's status before the law of Pennsylvania. And as some evidence of the Commission's status at state law, it is relevant to our Eleventh Amendment inquiry. However, it is far from determinative of that inquiry. We have explained that state law extending sovereign immunity to an agency is "relevant to the Eleventh Amendment determination, but it is not dispositive." *Bolden*, 953 F.2d at 815 n.8 (citations omitted).

> Thus, a state law determination of sovereign immunity may coincide with and influence the federal law determination of Eleventh Amendment status, but the former does not conclusively determine the latter . . . . [Otherwise], each state legislature apparently could confer Eleventh Amendment protection on any entity it wished, including counties and cities, by enacting a statute clothing these entities with "sovereign immunity" from suit on state claims.

Id. at 815 n.8, 817.

appointed by the Governor and confirmed by the Pennsylvania Senate. *See* 36 P.S. §§ 651.5(d), 652d; *see also* 71 P.S. § 67.1(d)(1) (Gubernatorial appointment and senatorial confirmation of Secretary of Transportation). The four remaining Commission members are also appointed by the Governor and confirmed by the Senate. *See* 36 P.S. §§ 651.5(b), 652d; *see also* 71 P.S. § 67.1(c)(2) (Gubernatorial appointment and senatorial confirmation of Commission members). State authority over the appointment of Commission members lends obvious support to a finding of sovereignty. *See Peters*, 16 F.3d at 1351-52.

On the other hand, weighing in favor of a finding of autonomy are the facts that the Commission may fix and revise tolls; enter contracts in its own name; issue bonds and notes; sue in its own name; purchase and own property; and promulgate rules and regulations for its own governance. *See* 36 P.S. § 651.16 (fix and revise tolls); 36 P.S. § 651.7 (enter contracts, sue in its own name, purchase and own property, and promulgate rules and regulations for its own governance); 36 P.S. § 651.12 (issue bonds and notes). Of course, several of these powers are subject to a degree of state control. For example, the Pennsylvania Attorney General must review the form and legality of each contract and rule or regulation the Commission proposes. *See* 71 P.S. § 732-204(b) (review of rules and regulations); 71 P.S. § 732-204(f) (review of contracts). Moreover, Commission issuance of bonds and notes is subject to state approval. *See* 36 P.S. § 652u.1

On balance, the significant control the Commonwealth exercises through the power to appoint all the members of the Commission weighs slightly in favor of Commission immunity from suit. *Cf. Peters*, 16 F.3d at 1351-52 (where separately incorporated agency was found to have power to enter contracts, hold property, and set and collect tolls, we held that the autonomy factor weighed "slightly" in favor of affording immunity in light of the states' power to appoint the members of the board of the agency in question).

D. *The Totality of Factors*

Having considered each of the three factors above, we now must consider the three factors in their totality. *See*

Bolden, 953 F.2d at 821. Since the most important factor, funding, weighs heavily against the Commission and only one factor weighs, even slightly, in favor of the Commission, the balance is clearly struck against a finding that the Commission enjoys sovereign immunity as an arm of the Commonwealth of Pennsylvania. Consequently, we find that the Commission is subject to suit in federal court. We will affirm the district court's conclusion to this effect.

IV. *Conclusion*

For the reasons stated above, we will affirm the district court's denial of the defendants' motions for summary judgment on Eleventh Amendment and qualified immunity grounds.

A True Copy:
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Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1386

CHARLES A. CHRISTY,

vs.

PENNSYLVANIA TURNPIKE COMMISSION, A DULY ORGANIZED AND EXISTING AGENCY OF THE COMMONWEALTH OF PENNSYLVANIA; ROBERT BRADY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JAMES J. DODARO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; HOWARD YERUSALIM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; FRANK S. URSOMARSO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JAMES F. MALONE, III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN L. SOKOL, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; S. MICHAEL PALERMO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOSEPH L. DIRIENZO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; SAMUEL S. CARNABUCI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; MELVIN M. SHELTON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; DEBORAH KOVAL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; JOHN A. BOSCHI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; VINCENT J. GRECO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN A. STEWART, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; GEORGE PILECKI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; SEAN PILECKI, INDIVIDUALLY

Pennsylvania Turnpike Commission, Robert Brady, Vincent Greco and John Stewart

Appellants No. 94-1386

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, Circuit Judges

The petition for rehearing filed by the appellants in the above-entitled case having been submitted to the judges who participatede in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

_____
Circuit Judge

Date: July 13, 1995

Supreme Court, U.S.
FILED
SEP 22 1995
OFFICE OF THE CLERK

No. 95-336

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN STEWART AND VINCENT GRECO,

Petitioners,

V.

CHARLES CHRISTY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

1. Whether the individual defendants are permitted to appeal the District Court's determination that they were not entitled to qualified immunity because the pretrial record was sufficient to establish a genuine issue of fact for trial.

2. Whether the Third Circuit correctly determined that the Pennsylvania Turnpike Commission's entitlement to Eleventh Amendment immunity must, like other affirmative defenses, be established by the party asserting it.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

JURISDICTION 2

STATEMENT OF CASE 2

Procedural History 2

Factual Background 3

SUMMARY OF THE ARGUMENT 10

REASONS FOR DENYING THE WRIT 10

I. The District Court's Denial of Petitioners' Motion for Summary Judgment on the Issue of Qualified Immunity was Based Upon a Factual Determination and Therefore not Appealable. *Johnson v. Jones*, 115 S.Ct. 2151 (1995) 11

II. The Third Circuit Followed *Hess v. Port Authority* and Correctly Found That The Commission was not Entitled to Eleventh Amendment Immunity 19

Table of Contents (continued)

Page

1. The Third Circuit Correctly Determined That The Commission's Entitlement to Eleventh Amendment Immunity Must, Like Other Affirmative Defenses Be Established By the Commission 19

2. There Was Sufficient Evidence In the Record To Support the Third Circuit's Decision that the Commission Was Not Entitled to Eleventh Amendment Immunity 21

CONCLUSION 24

APPENDIX RA-1

TABLE OF AUTHORITIES

Cases **Page(s)**

Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287 (1980) 16

Christy v. Pennsylvania Turnpike Commission, 845 F. Supp. 1107 (E.D. Pa. 1994) 1, 12-15

Christy v. Pennsylvania Turnpike Commission, 1995 WL 127077 (3d Cir. March 27, 1995) 3

Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140 (3d Cir. 1995) . . 1, 4, 17, 18, 20, 22-24

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673 (1976) . 16

Hess v. Port Authority Trans-Hudson Corporation, 115 S.Ct. 394 (1995) 10, 19-22

ITSI TV Productions v. Agricultural Associations, 3 F.3d 1289 (9th Cir. 1993) 20

Johnson v. Jones, 115 S.Ct. 2151 (1995) 2, 4, 10, 11, 15-17

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 99 S.Ct. 1171 (1979) 21

Table of Authorities (continued)

Cases **Page(s)**

Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729 (1990) 16

Spector v. Commonwealth, 341 A.2d 481 (1975) . 22, 23

Statutes, Rules and Regulations

Pa. Stat. Ann. tit. 36, §652a *et seq.* (1961) 4

36 Pa. Cons. Stat Ann. §651.1 *et seq.* (1995) 4

No. 95-336

In The

Supreme Court of the United States

October Term, 1995

PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN STEWART AND VINCENT GRECO

Petitioners,

vs.

CHARLES CHRISTY

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Charles Christy, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's opinion below which affirmed the District Court's denial of summary judgment on the issues of Eleventh Amendment and qualified immunity. The opinions of the District Court and Third Circuit are reported at 845 F. Supp. 1107 (E.D.Pa. 1994) and 54 F.3d 1140 (3d Cir. 1995) and are reprinted in the petition for certiorari at Appendices A and B, respectively.

JURISDICTION

Respondent submits that under *Johnson v. Jones*, 115 S.Ct. 2151 (1995), this Court does not have jurisdiction to review the order in question insofar as it relates to the denial of qualified immunity because the District Court found that the pretrial record was sufficient to establish a genuine issue of fact for trial.

STATEMENT OF CASE

Procedural History

Respondent, Charles Christy ("Christy"), commenced this action on June 22, 1993 by filing a complaint against the Pennsylvania Turnpike Commission (the "Commission"), Robert Brady ("Brady"), John Stewart ("Stewart"), Vincent Greco ("Greco") and John Boschi ("Boschi") alleging, inter alia, that he was not promoted to the position of paint crew foreman by the petitioners for partisan political reasons in violation of his First Amendment rights. On October 27, 1993, after limited discovery, Christy sought leave to amend his complaint to add eleven additional defendants (each of whom was also directly and influentially involved in the deprivation of Christy's constitutional rights), assert additional claims based on his failure to receive a second promotion and to modify, sharpen and/or delete certain other claims. On November 12, 1993, the petitioners filed motions for summary judgment asserting Eleventh Amendment immunity on behalf of the Commission, qualified immunity on behalf of the individuals and lack of any genuine issue of material fact as to each petitioner.

Christy was granted leave to amend his complaint on February 3, 1994 and the District Court denied petitioners' motions for summary judgment, in toto, on March 10, 1994. The petitioners appealed the District Court's denial of their motions for summary judgment to the Third Circuit on the grounds of Eleventh Amendment and qualified immunity. The Third Circuit initially found that the Commission was not entitled to Eleventh Amendment immunity and correctly dismissed the individual petitioners' appeal on qualified immunity grounds for lack of jurisdiction because the District Court ruled it could not find qualified immunity based on the facts at summary judgment. *Christy v. Pennsylvania Turnpike Commission*, 1995 WL 127077, *1 n.4 (3d Cir. March 27,1995), on rehearing, 54 F.3d 1140 (3d Cir. 1995).

On petition for rehearing, the original opinion was vacated and a new opinion issued by the panel without further argument or briefing which affirmed the District Court's denial of petitioners' motions for summary judgment based on both sovereign and qualified immunity grounds. The Third Circuit addressed the issue concerning its jurisdiction to rule on the issue of qualified immunity where the pretrial record contains genuine issues of material fact, as follows:

> The plaintiff contends that we lack jurisdiction to entertain this argument because the district court's decision was based on factual rather than legal grounds. We do not agree. We will not address this question at length, however, because it appears likely that the Supreme Court will soon resolve this question in *Johnson v. Jones*, No. 94-455, 1995 WL 243454 (Argued April 18, 1995).

Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1143-44 n. 4 (3d Cir. 1995). A second petition for a rehearing was considered by the Chief Judge and thirteen Circuit Judges and ultimately denied apparently without any Circuit Judge voting in favor of a rehearing. See Opinion reprinted in the petition for certiorari at Appendix C.

Several weeks after the Third Circuit entered its revised opinion, this Court rendered its unanimous decision in *Johnson*, holding that " ... a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 115 S.Ct. at 2159. Further review of the district court's denial of petitioners' qualified immunity defense because of the existence of genuine issues of material fact for trial is precluded by this Court's decision in *Johnson*.

Factual Background

The Commission is an autonomous independent agency created in 1937 by Act 1937-211 to construct, finance, operate and maintain a toll highway in the Commonwealth of Pennsylvania.[1] The Commission receives most of its funds from sources other than the Commonwealth of Pennsylvania which has effectively disclaimed responsibility for any obligations that the Commission may incur.

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[1] See, Pa. Stat. Ann. tit. 36, §652a et seq. (1961). Act 37-211 has been subsequently amended on several occasions, most recently by Act 1985-61. See, 36 Pa. Cons. Stat Ann. §651.1 et seq. (1995).

Brady is one of five Commissioners who are responsible for the operations of the Commission. Stewart (Asst. Deputy Exec. Director-Maintenance), Greco (Division Superintendent) and John Boschi ("Boschi") (Deputy Exec. Director-Maintenance) are employed by the Commission as senior level managers. Although not a party to this appeal, Boschi's separate motion for summary judgment was also denied by the District Court and affirmed by the Third Circuit on consolidated appeal.

Christy has been employed by the Commission as a highly skilled mechanic for over 18 years. According to his superiors, he has a fine reputation and would have been selected to be the Division's mechanic instructor over all other mechanics even if seniority was not a factor. Christy possesses the unique ability to operate, repair and maintain virtually all equipment utilized by the maintenance department, including all equipment utilized by the line painting crews. Christy has also directly supervised Commission personnel.

In early 1993, Christy sought to be promoted to the position of paint crew foreman and was interviewed for the position along with several other candidates (including Sean Pilecki who ultimately received the promotion) by Stewart, Greco and Boschi. Under Policy Letter 65, Stewart, Greco and Boschi were responsible for interviewing the candidates and recommending the top 3-6 candidates to the personnel committee who in turn recommended the most qualified candidate to the Brady who together with the other Commissioners decided to promote Sean Pilecki instead of Christy.

Stewart and Greco claim that they " ... had nothing to do with the filling of the paint crew foreman vacancy after interviewing Christy and recommending him as one of the three most qualified candidates." Petition at 3. Brady claims that " ... his only role in this case was to approve on a "yes or no" basis the recommendations of the Personnel Committee for the paint crew foreman ... ." Petition at 4. The record however, indicates that each petitioner was materially and actively involved in the deprivation of Christy's First Amendment rights.

Several weeks after the decision not to promote Christy was made, Christy confronted Boschi in the old ambulance room at the Devault maintenance facility and asked why Sean Pilecki was chosen to be the paint crew foreman instead of him. Boschi admitted to Christy that:

- Christy did not receive the promotion because he did not support Brady (Democratic Chairman of Philadelphia) or any political officials supported by him and without political support Christy would not receive a promotion.

- Sean Pilecki was awarded the position not on the basis of merit but because he and his father were politically aligned with Brady and elected officials supported by him.

- Christy should have his father use his political affiliation with Senator Fumo to have Brady create an asst. foreman position for Christy and all that was needed was a phone call from Brady awarding the position

to Christy.

- Sean Pilecki was Brady's man for the job and we went along with it and made sure Sean got the job.

- Christy and not Sean Pilecki was the most qualified candidate for the job.

See, Christy Affidavit at RA-2, 3. Christy's recollection of his conversation with Boschi was corroborated by Jim Sperduti, another Commission employee who was standing next to a partially opened door only a few feet away from Christy and Boschi. See, Jim Sperduti Statement at RA-15.

In order to promote Sean Pilecki for partisan political reasons, the interview and promotional system had to be manipulated in order to bring about the desired result. Brady, Stewart, Greco and Boschi were each involved in that manipulation.

Christy's interview for the position by Stewart, Greco and Boschi was, at best, perfunctory, lasting only 13 minutes. See, Christy Affidavit at RA-1. They asked very few relevant questions and their inquiry into Christy's qualifications was minimal. Id. The outcome of the interview did not matter because Boschi, Stewart and Greco were already aware that Brady's sponsored candidate, Sean Pilecki, would receive the promotion and they were merely papering the file.

Stewart, Greco and Boschi did more than just paper the file - they submitted false and materially misleading documentation to (and withheld other documentation from)

the personnel committee to ensure that Brady's sponsored candidate received the promotion. The Recommendation Memo to the personnel committee prepared by Stewart, Greco and Boschi summarizing the qualifications of the top three candidates overstated the qualifications of Sean Pilecki and understated the qualifications of Christy. See, Recommendation Memo at RA-7.

Lou Sperduti (the outgoing paint crew foreman who had previously been the direct supervisor of both Sean Pilecki and Christy) told Christy that he was more qualified than Sean Pilecki and should have been promoted to paint crew foreman. See, Christy Dep. at RA-13. Michael Haney (then Lou Sperduti's immediate supervisor) told Christy that he should have received the promotion instead of Sean Pilecki. See, Christy Dep. at RA-14.

The Recommendation Memo falsely stated that Christy lacked supervisory experience and had limited administrative experience. Lou Sperduti testified that Christy had supervisory experience and administrative experience. See, Lou Sperduti Dep. at RA-17, 18.

The Recommendation Memo falsely stated that Sean Pilecki supervised line painting operations in the absence of the paint crew foreman during the last three years. Lou Sperduti stated that Sean Pilecki provided no direct supervision of the paint crew. See, Lou Sperduti Dep. at RA-21, 22. Finally, even Sean Pilecki admitted that "[he] was not a supervisor at all".

While Sean may have performed certain record keeping tasks in Lou Sperduti's absence, he did not supervise line painting operations. In fact, Sean Pilecki had

absolutely no supervisory experience whatsoever.

Stewart, Greco and Boschi each provided conflicting testimony concerning Christy's qualifications. In their answer to Christy's complaint paragraph 16, each of them denied that:

> Christy met all of the job qualifications and was particularly well qualified for the position of Paint Crew Foreman because he had extensive knowledge of the equipment involved and in the work performed by the highway maintenance crew, had the ability to repair the equipment and also had prior experience in training and supervision of employees.

Boschi and Stewart each stated that Christy and Sean Pilecki were "equally qualified". See, Boschi Dep. at RA-9 and Stewart Dep. at RA-11. When asked who he felt was the most qualified, Greco stated that he felt they were all qualified although he hoped that Sean Pilecki would receive the promotion. See, Greco Dep. at RA-10. Boschi later told Christy and Lou Sperduti that he thought Christy was the best man for the job. See, Christy Dep. at RA-12 and Lou Sperduti Dep. at RA-24.

The foregoing evidence (the existence of which was not disclosed by the petitioners) when viewed in a light most favorable to Christy together with the reasonable inferences which maybe drawn therefrom leads only to the conclusion that there are material issues of fact concerning the true nature and extent of each petitioners' involvement in the failure to promote Christy for partisan political

reasons in violation of his First Amendment rights. Petitioners' assertion that their are no genuine issues of material fact in support of Christy's claims is false, misleading and a gross mischaracterization of the record in this case.

SUMMARY OF THE ARGUMENT

I. Under *Johnson v. Jones*, 115 S.Ct. 2151 (1995), the District Court's denial of petitioner's motion for summary judgment on the issue of qualified immunity was based on a determination that genuine issues of material fact existed for trial and, therefore, is not appealable.

II. The Third Circuit correctly applied the standards reiterated by this Court in *Hess v. Port Authority Trans-Hudson Corporation*, 115 S.Ct. 394 (1995) and found that the Commission was not entitled to Eleventh Amendment immunity.

REASONS FOR DENYING THE WRIT

In an effort to obtain review by this Court, the petitioners have mischaracterized the nature of the qualified immunity question presented for review. Petitioners suggest that analysis applied by the District Court and the Third Circuit was inconsistent with this Court's qualified immunity decisions. Petition at 8. This suggestion is incorrect and under *Johnson* this Court lacks jurisdiction to even review the District Court's decision denying petitioners' qualified immunity because genuine issues of material fact exist for trial.

The Third Circuit did not decide the Eleventh Amendment immunity issue presented by this case until after *Hess* had been decided and obviously its decision conformed and applied the standards established by this Court. Moreover, the facts in this proceeding are sufficiently unique that their precedential value is likely to be minimal.

I. THE DISTRICT COURT'S DENIAL OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF QUALIFIED IMMUNITY WAS BASED UPON A FACTUAL DETERMINATION AND THEREFORE NOT APPEALABLE. *JOHNSON V. JONES*, 115 S.Ct. 2151 (1995).

The qualified immunity issue presented to the District Court was a factual issue - did petitioners participate in the denial of Christy's First Amendment rights by denying him a promotion for partisan political reasons. In their Petition for Writ of Certiorari, petitioners repeat their fact-based claim of non-participation. Petitioners allege that:

> "Petitioners Greco and Stewart had nothing to do with the filling of the paint crew foreman vacancy after interviewing Christy and recommending him as one of the three most qualified candidates...Petitioner Robert Brady is the only Commissioner originally named as a Defendant in this case; his only role in this case was to vote to approve on a 'yes or no' basis the recommendations of the Personnel Committee..."

Petition at 3-4.

Petitioners' claim of non-participation was correctly recognized by the District Court as a factual issue separate and apart from the question of whether the constitutional right claimed by Christy was clearly established. The constitutional right at issue was the right of free speech and free association and the alleged deprivation was the denial of a promotion by a governmental agency because of political affiliation or lack thereof.

The District Court's resolution of the "established right" issue was succinct and incontrovertible. The District Court stated:

> "Here, the essential thrust of Plaintiff's case is that his first amendment rights to free speech and free association were violated by the defendants by their failure to promote him for purportedly unlawful partisan political reasons. It is therefore fairly obvious that Mr. Christy is indeed inserting the violation of a constitutional right.
>
> Moreover, and as discussed below, it has long been established that conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition unless it can be shown that party affiliation is an acceptable criterion for some type of government employment or that an employee's private political beliefs would interfere with the discharge of his public duties... In 1990, in deciding *Rutan v. Republican Party of Illinois* ..., the U.S. Supreme Court extended this rationale to

> apply with equal force to promotional decisions thereby prohibiting partisan or political considerations from having any influence in the promotional process. Again, it is clear that this was the prevailing state of the law in 1992 and 1993 when the employment decisions at issue in this case were made."

Petition at 13a-14a.

Having determined that the constitutional right asserted was clearly established at the time of the challenged hiring decision, the District Court then reviewed the record to determine whether there was a genuine issue of material fact as to petitioners' participation in the failure to promote Christy for partisan political reasons. The District Court stated:

> "Furthermore, it is evident from the Turnpike Commission's Policy Letter... and from the deposition testimony of John Boschi..., Vincent Greco... and John Stewart..., that the Defendants like all others involved in the promotion process, had been specifically apprised of the Supreme Court's holding in *Rutan*. Inasmuch as our review of the record in this case reveals that Messrs. Boschi, Greco and Stewart admit that they were responsible for interviewing, assessing and 'grading' candidates for the position(s) for which Mr. Christy applied, and that Mr. Brady, together with his fellow commission members, voted to approve the appointment

> of Sean Pilecki, it is clear that defendants were all involved in the promotions process in this case. Accordingly, viewing all of the evidence in this matter in light of the foregoing precedent and in the manner most favorable to the plaintiff, we are unable to find as a matter of law that these defendants did not violate Mr. Christy's clearly established rights or that they are entitled to the cloak of qualified immunity from this suit. The motions for summary judgment on the basis of qualified immunity from suit must therefore be denied."

Petition at 14a-15a.

Having found a genuine issue of material fact as to petitioners' participation, the District Court then reviewed the record for evidence of political motivation behind petitioners action. The District Court found such evidence and described it as follows:

> "We next evaluate whether the record evidence demonstrates that Plaintiff was engaged in constitutionally protected conduct and whether that conduct was a substantial or motivating factor in the Commission's decision to promote another candidate. Again viewing the record in the light most favorable to the plaintiff, the testimony and affidavits of Mr. Christy himself, the affidavit and deposition of James Sperduti and the deposition testimony of John Boschi reflect that while the plaintiff had been active in

> Democratic party politics in Chester County, the only way he could get a promotion with the Commission was by aligning himself with defendant Robert Brady and Philadelphia County Democratic State Senator Vincent Fumo and pressuring those individuals to promote or create a higher, better paying position for him. This evidence is insufficient indicia that Mr. Christy was engaged in exercising his first amendment right to not associate or align himself with Mr. Brady and/or Senator Fumo and that his decision to not so associate or align himself with those individuals was a substantial or motivating factor in the Commission's decision to instead promote Sean Pilecki who, along with his father, was apparently so aligned."

Petition at 7a-18a. In addition, the District Court reviewed the interview and evaluation process and found it to be somewhat "skewed". Petition at 18a.

Petitioners claim to qualified immunity based on allegations of non-participation is analogous to the claims made by petitioners in *Johnson v. Jones*, 115 S.Ct. 2151 (1995), recently decided by this Court on June 12, 1995. In *Johnson*, three police officers who were sued for excessive force in making an arrest claimed that they had not beaten the plaintiff and were not present while others did so. The district court denied their motion for summary judgment based upon qualified immunity because of deposition testimony that the three officers were present at the time of plaintiff's arrest and were in or near the room where

plaintiff claimed to have been beaten. The police officers appealed on the basis that the record did not support a finding that there was a genuine issue of material fact as to their participation.

In *Johnson*, this Court held that where the defense of qualified immunity is based upon a factual assertion of non-participation, such claim is too deeply entwined with the underlying merits of the case to qualify for interlocutory appeal. This Court stated:

> "The upshot is that, compared with *Mitchell*, considerations of delay, comparative expertise at trial and appellate courts, and wise use of appellate resources, argue in favor of limiting interlocutory appeals of 'qualified immunity' matters to cases presently more abstract issues of law. Considering these 'competing considerations,' we are persuaded that 'immunity appeals...interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law.'"

115 S.Ct. at 2158.

In both *Johnson* and the instant case, there are no issues of law. The constitutional right claimed by Christy was well defined through the triumvirate of *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980), *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729 (1990). The only matter at issue was the purely factual question of petitioners' participation in the decision to deny Christy's promotion for partisan political reasons.

Mindful of Justice Breyer's admonition that "questions about whether or not a record demonstrates a single 'genuine' issue of fact for trial, if appealable, can consume inordinate amounts of appellate time",[2] Christy has not engaged, in this Answer, in a lengthy discussion of the evidentiary support in the record which establishes a genuine issue of material fact as to petitioners' participation. It is abundantly clear from this Court's holding in *Johnson* that it is not the function of an appellate court to second guess or even review a district court's denial of a motion for summary judgment on the issue of qualified immunity where that denial is based upon a factual determination of the defendant's participation in the alleged deprivation of a constitutional right.

Because *Johnson* had been argued but not yet decided when the Court of Appeals issued its Opinion, the Court of Appeals did not address at length of the question of whether the district court's denial of summary judgment on the qualified issue immunity was an appealable order. In a footnote, the Court of Appeals stated:

> "The individual defendants argue that the district court erred in denying their motions for summary judgment based on qualified immunity. The plaintiff contends that we lack jurisdiction to entertain this argument because the district court's decision was based on factual rather than legal grounds. We do not agree. We will not address this question at length, however, because it

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[2] *Johnson*, 115 S.Ct. at 2158.

> appears likely that the Supreme Court will soon resolve this question in *Johnson v. Jones* ..."

Petition at 27a.

Nevertheless, the Court of Appeals recognized that the issue was essentially a factual issue and affirmed the district court's decision that there was sufficient evidentiary support in the record to establish a genuine issue of material fact as to petitioners' participation in the alleged violation of Christy's First Amendment rights . The Court of Appeals stated in the same footnote:

> "While we believe that we have jurisdiction to entertain individual defendants' qualified immunity argument, we affirm the district court's decision on the merits. When the disputed facts are viewed in the light most favorable to Christy, as they must be at summary judgment, we agree that the individual defendants were not entitled to qualified immunity."

Petition at 27a.

Petitioners will have their opportunity at trial to persuade the jury that they did not participate in the denial of Christy's promotion for partisan political reasons in violation of Christy's constitutionally protected right to free speech and free association. However, having failed to persuade the District Court that there are no genuine issues of material fact as to their actual conduct, petitioners may not now pursue an interlocutory appeal and seek appellate

review of the District Court's denial of their motion for summary judgment on the qualified immunity issue.

II. THE THIRD CIRCUIT FOLLOWED *HESS V. PORT AUTHORITY* AND CORRECTLY FOUND THAT THE COMMISSION WAS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

On October 24, 1994, the Third Circuit initially delayed the resolution of this action by entering the following Order:

> IT IS HEREBY ORDERED that the Court has determined to c.a.v. the above matter pending the decision of the United States Supreme Court in *Hess v. Port Authority Trans-Hudson Corporation*, No. 93-1197.

After this Court decided *Hess*, the Third Circuit correctly applied the standards reiterated by this Court in *Hess* and found that the Commission was not entitled to Eleventh Amendment immunity.

1. The Third Circuit Correctly Determined That The Commission's Entitlement to Eleventh Amendment Immunity Must, Like Other Affirmative Defenses Be Established By the Commission.

The Commission asserts that it was improper for the Third Circuit to impose upon it the burden of establishing its entitlement to Eleventh Amendment immunity. Petition at 25. According to the Commission, Christy, as the party

asserting jurisdiction, bears the burden of establishing such jurisdiction. Id. The Commission, however, was unable to cite any cases which support its position. The two cases cited by the Commission did not involve Eleventh Amendment immunity issues at all.

The Third Circuit adopted the approach of the Ninth Circuit in *ITSI TV Productions v. Agricultural Associations*, 3 F.3d 1289 (9th Cir. 1993) and correctly found that:

> Because Eleventh Amendment immunity can be waived by a party, or forfeited through non-assertion, it does not implicate federal subject matter jurisdiction in the ordinary sense. Id. at 1291. We agree with the Ninth Circuit that "whatever its jurisdictional attributes, [Eleventh Amendment immunity] should be treated as an affirmative defense[,]" and "like any other such defense, that which is promised by the Eleventh Amendment must be proved by the party that asserts it and would benefit from its acceptance." Id. We also agree with the Ninth Circuit that considerations of fairness support this conclusion.

Christy, 54 F.3d at 1144 (citing *ITSI TV Productions*). The Third Circuit's decision to impose the burden of proof on the Commission is entirely consistent with this Court's decision in *Hess v. Port Authority Trans-Hudson Corporation*, 115 S.Ct. 394 (1995).

This Court addressed the issue of burden of proof in *Hess* as follows:

> We then set out a general approach: we would presume that the Compact Clause agency does not qualify for Eleventh Amendment immunity "[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose".

Id. at 402 (citing *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 99 S.Ct. 1171, 1177 (1979)). The presumption is that the state agency, in this case, the Commission, does not qualify for Eleventh Amendment immunity. It is therefore up to the Commission to rebut this presumption by presenting sufficient evidence to show that it is in fact entitled to Eleventh Amendment immunity. The analysis is the same irrespective of whether the agency is a single state agency or a bistate agency.

2. There Was Sufficient Evidence In the Record To Support the Third Circuit's Decision that the Commission Was Not Entitled to Eleventh Amendment Immunity.

The parties each fully briefed and presented a significant amount of evidence in support of their respective positions on the issue of Eleventh Amendment immunity. The Third Circuit after reviewing the arguments made by the parties and applying the criteria set forth by this Court

in *Hess*, correctly found that the Commission was not entitled to Eleventh Amendment immunity. *Christy*, 54 F.3d at 1150.

In this case, as in *Hess*, the indicators of immunity (liability of the state, status under state law and autonomy) did not all point in the same direction. This Court found in *Hess* that when the indicators of immunity point in different directions, the Eleventh Amendments twin reason for being (states integrity and the prevention of federal court judgments paid from state treasuries) remain the prime guide. *Hess*, 115 S.Ct. at 404. Specifically, this Court summarized the analysis as follows:

> If the expenditures of the enterprise exceed receipts, is the state in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" - both legally and practically - then the Eleventh Amendment's core concern is not implicated.

Id. at 406. In *Hess*, this Court found that the Port Authority did not qualify for Eleventh Amendment immunity because it was financially self-sufficient, generated its own revenues and paid its own debts. Id.

The Commission, like the Port Authority is financially self sufficient, receives most of revenue from sources other than the Commonwealth of Pennsylvania and pays its own obligations. In *Spector v. Commonwealth*, 341 A.2d 481 (1975), the Pennsylvania Supreme Court held that the Commission was not an arm of the Commonwealth and was not entitled to sovereign immunity. After examining the legislative acts creating the Commission and defining its

purposes and powers, the Pennsylvania Supreme Court determined that:

> There is, of course, no doubt that the Commonwealth itself could have constructed the Turnpike in the same manner that it constructs and operates its State highways. Had it done so, the State's immunity from suit would encompass actions arising in connection with the Turnpike. But the Commonwealth itself did not build this highway and does not maintain it. The legislature created this separate body and at the same time disclaimed any responsibility on the part of the Commonwealth for liabilities for which it, the Commission, might incur. It is clear that the Commission is not an integral part of the Commonwealth, and cannot share in the attributes of sovereignty which inhere in the state.

341 A.2d at 491. Shortly after the *Spector* decision, the Pennsylvania legislature passed a sovereign immunity statute which legislatively conferred on upon independent agencies such as the Commission, that which they otherwise lacked, namely, immunity from suit in state court. However, the Third Circuit correctly found that the legislature (which did not significant amend the legislative acts governing the Commission) did not conclusively repudiate *Spector's* conclusion that the Commission was not an integral part of the Commonwealth and does not share in the attributes of sovereignty inherent in the state. *Christy*, 54 F.3d at 1149.

The Commission was simply unable to establish that (i) a judgment against it would be tantamount to a judgment against Pennsylvania, (ii) it lacked sufficient resources to pay a judgment against it or (iii) Pennsylvania would be under any obligation to satisfy a judgment against the Commission. *Christy*, 54 F.3d at 1148. A remand to the District Court for additional fact finding would be pointless.

CONCLUSION

Evidently, petitioners do not believe that it is possible for the District Court, the panel or the Third Circuit en banc to have ruled against them had they really understood the law and petitioners' arguments. Apparently, petitioners believe that if they repeat their arguments enough times, the District Court (which is currently considering renewed motions for summary judgment on behalf of all defendants), the panel or the Third Circuit en banc will eventually agree with them. However, petitioners have identified no legal basis for their entitlement to repeated bites at the same apple. Quite simply, the petitioners were wrong when they first made these arguments and they are still wrong.

Accordingly, for all of the foregoing reasons, petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

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September 22, 1995

APPENDIX

Affidavit of Charles Christy RA-1-6

Promotion Recommendation Memo RA-7, 8

John Boschi Deposition RA-9

Vincent Greco Deposition RA-10

John Stewart Deposition RA-11

Charles Christy Deposition RA-12-14

Jim Sperduti Statement RA-15-16

Louis Sperduti Deposition RA-17-24

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, Charles Christy, being duly sworn according to law do hereby state the following:

1. My interview for the position of Paint Crew Foreman conducted by defendants Boschi, Greco and Stewart was "perfunctory" in nature and lasted only approximately 13 minutes. During the interview, I was not asked any questions concerning: (i) line painting experience; (ii) knowledge of painting specifications (except for a single question); (iii) direction of work crews; (iv) administrative background; (v) ability to prepare and utilize budgets and estimates; (vi) ability to prepare and maintain records and file; (vii) knowledge of safety procedures; (viii) supervisory skills; (ix) planning capabilities; (x) utilization of staff input; (xi) handling of supervisor's directions (except for a single question); (xii) ability to make emergency decisions; or (xiii) computer experience.

2. Defendants Boschi, Greco and Stewart each prepared a written evaluation of me which evaluations were not accurate and did not present a fair evaluation of my qualifications.

3. Louis Sperduti told me that Brady and Boschi had a heated conversation concerning the initial demand letter sent by my attorney to Kevin Longenbach, Esquire, and that

Brady instructed Boschi to "keep his name out of this matter and that this is all your fault and your going to have to deal with it".

4. During my conversation with Boschi on March 17, 1993, Boschi made the following statements:

a. Promotions within the Commission have been and continue to be made on the basis of political patronage;

b. Sean Pilecki was awarded the position not because of his qualifications but because he and his father were politically aligned with defendant Brady (the Democratic Chairman of Philadelphia County) and political officials supported by him and those individuals determine who receive promotions within the Commission;

c. Brady, after being contacted by an elected official, made the decision to promote Sean Pilecki and Brady regularly makes decisions who should be promoted based on political affiliation;

d. Sean Pilecki was Brady's man for the job and that the job would be awarded to him. We just went along with Brady's decision and made sure that Sean got the job. He told me that is how promotions are given out. He stated that merit has nothing to do with it and I should know that. He told me I should know how the political games are played;

e. He told me that I did not receive the promotion because I did not support Defendant Brady or any political officials supported by him and without political

support I would not receive any promotion within the Commission;

f. If I desired to be promoted within the Commission, I must align myself politically with Defendant Brady, Senator Vincent Fumo and other political officials supported by Defendant Brady;

g. William Christy (my father and former Democratic Chairman for Chester County) should use his political affiliation with Senator Fumo to have Defendant Brady create an Assistant Foreman Position at the DeVault Maintenance Facility for Christy and all that was needed for me to become an Assistant Foreman was a phone call from defendant Brady awarding the position to me;

h. An Assistant Foreman Position at the Plymouth Maintenance Facility was recently created for Charlie Jackson in this manner and Carmen DeStefano would also receive a promotion in a similar manner (of course, those individuals were ultimately awarded those positions just as Boschi had said they would be);

i. He was certain that I did not receive the promotion because of my political affiliations and the political affiliations of Sean Pilecki and that he knew the names of some of the politicians involved in the decision not to promote me and that senior level Commission employees were also involved; and

j. He had recently received a number of letters from attorneys representing Commission employees who were dissatisfied with the Commission's promotion practices and that he had to deal with them (he showed me

three (3) of the letters).

5. Louis Sperduti also told me that during a meeting involving Boschi, Stewart, Louis Martin, Esquire, Michael Palermo (a member of the personnel committee) and possibly other Commission employees, that (i) Michael Palermo stated that "the Christy matter is all your fault; you and your big mouth always gets us into trouble; this is the last time; after this you can just pack your bags and you and Stewart are both out," and (ii) Louis Martin stated that "I warned you about Rutan two years ago and you would not listen."

6. Robert Neff ("Neff") (the Commission's Master Mechanic in District Five who occupied an office next to George Pilecki) told me that around the time that the interviews were being conducted for the Paint Crew Foreman position, he received numerous telephone calls from JoAnn Zucker (Brady's administrative assistant) who asked to speak to George Pilecki and that based on what he overheard, he believed that George Pilecki and JoAnn Zucker discussed the filling of the Paint Crew Foreman position.

7. Neff also told me that around the time that my attorneys sent the initial demand letter to Kevin Longenbach, he overheard part of a telephone conversation between JoAnn Zucker and George Pilecki discussing my attorneys' letter and that George Pilecki stated "Yes, I heard the shit's going to hit the fan".

8. Tim Keebler informed me that: (i) defendant Boschi had instructed Michael McClurkin (Equipment Director) to alter the evaluations of one or more of the

candidates for the position of Eastern Division Equipment Supervisor because it was "in the Commission's best interest" that Frank Dunn (who was not among the most qualified candidates) receive the promotion; and (ii) Frank Dunn was originally not among the list of qualified candidates and was not even qualified for the position but Boschi demanded that his name be inserted on the list of the most qualified candidates.

9. Charles Jackson, Frank Procoppio, Nate Brogno, Vince Talucci, Spike DeStefano and Claude Camiel admitted to me that they received patronage promotions.

10. Boschi, Stewart and Greco did not have sufficient personal knowledge of my qualifications and abilities to fairly and adequately evaluate me as a candidate for a promotion with the Commission.

11. I am an active supporter of the Democratic party and serve as a Democratic Ward leader for the Third Ward in West Chester, Pennsylvania. I am also a member of the Chester County faction of Democratic Party. Each of the defendants were aware of my political affiliations prior to the interviews because these facts were disclosed on my Resume' and because an employees' political affiliations were common knowledge among Commission employees, including the defendants. Boschi also told me that he was aware that my father was once a Democratic County Chairman.

12. I recently learned from Al D'Archangleo, a Democratic Committeeman and an employee of the Commission that there have been and continue to be heated disputes among members of the Chester County faction of

the Democratic Party (of which I am a Ward leader) and members of the Philadelphia County faction of the Democratic Party (of which defendant Brady is the Chairman) concerning which candidates should be supported and other political ideologies. I have also recently learned that several of these disputes directly involved Brady and Sheila Chambers, the Democratic Chairwoman for Chester County. Al D'Archangleo told me that earlier this year, he observed a heated debate - shouting, pushing and shoving between Chester County Democrats supporting Sam Stretton and Philadelphia Democrats supporting Joseph Nigro over whose candidate would receive the nomination.

IN WITNESS WHEREOF, the undersigned, Charles Christy, has executed this affidavit on this 16th day of December 1993.

Charles Christy
CHARLES CHRISTY

Sworn to and subscribed
before me this 16th day
of December, 1993.

_____
Notary Public

My Commission expires:

Form PTC-52-08

PENNSYLVANIA TURNPIKE COMMISSION
HARRISBURG

Subject: Eastern Division Paint Crew Foreman
Commission Appointment
Posted 11/9/92 to 11/19/92

January 19, 1993

To: Joseph L. DiRienzo
Director of Human Resources

From: John A. Boschi
Deputy Executive Director - Maintenance

Thru S. M. Palermo
Associate Executive Director

On January 15, 1993, ten candidates were interviewed for the above position. The three below listed candidates, listed alphabetically, have met the minimum requirements for this first line supervisory position.

Charles A. Christy - Current job title, Auto Mechanic at Devault Maintenance. Sixteen years with Pennsylvania Turnpike, mainly automotive field. High school graduate with two years community college. Lacks supervisory experience, has administrative background in automotive field.

Sean D. Pilecki - Current job title, Equipment Operator 2 on Eastern Division Paint Crew. He is a high school graduate with 4½ years experience on the paint crew. He has supervised line painting operations in the absence of the Foreman, during past three years. He displays strong technical skills in the line painting operations, especially in paint machine computer controls. He also is mechanically inclined with experience in H.V.A.C. trades. He is familiar with PTC line painting operations to include safety policies and procedures.

Daniel J. Walters - Outside candidate. Has construction and paving background with utility companies, currently a laborer/foreman trainee with DeMarco Construction in King of Prussia, Pennsylvania. Has crew supervisory experience, but lacks knowledge of line painting operations or line paint equipment.

Updated applications and resumes are attached for above candidates.

Approved: John Sakal Date 11/2/95

S.M. Palermo

pc: S. Palermo
K. Nicholson

Q. And what was your response to that question?

MS. DiPIETRO: Can you read back what his response was to that question?

(The court reporter read back from the record.)

BY MR. HICKEY:

Q. So your position is that the candidates were equally qualified?

A. Yes.

Q. The next question that I asked Mr. Sperduti, didn't John Boschi tell you that Chuck was not given the paint crew foreman position due to political influence exerted by George Pilecki?

Lou Sperduti responded, I'm not sure how he said it, about whether it was due to George Pilecki, but he said that it was political, politics involved.

And do you recall that conversation?

A. No, I do not recall that.

Q. Do you believe that politics were involved behind the promotion of Sean Pilecki to the paint crew foreman position?

MR. BAYLSON: I object to the form of

A. Yes, sir, it is.

Q. And of the three candidates, who did you feel was the most qualified?

A. I felt they were all qualified.

Q. Did you feel that any one was more qualified than the others?

A. First of all, they're all qualified or they wouldn't be on this list because we had scores and no one knew each other.

We took each question and each answer and knowing what the job was Mr. Pilecki did under me, I was hoping he would get the position. But that was the end of it. That's out of our hands after that interview.

Q. So you were pulling for Sean?

MR. BAYLSON: I object. He didn't say that. You asked him his privately held opinion.

MR. HICKEY: Which was he would have liked to have seen Sean get the job.

MR. BAYLSON: He said he didn't communicate that to anybody.

BY MR. HICKEY:

Q. Now, other than the evaluation memo,

job?

A. Not in my opinion.

Q. In your opinion, do you feel that Sean Pilecki was more qualified for the job than Mr. Christy?

A. I think they were all equally qualified.

Q. If you had to pick a candidate to fill the position of paint crew foreman, which candidate would it be?

MR. BAYLSON: I object. I don't know how he can answer that without speculating. I don't want you to speculate. If you can answer that without speculating.

THE WITNESS: It's not my position to select the final candidate for the position.

BY MR. HICKEY:

Q. But did you develop an opinion as to who you thought the most qualified candidate was?

A. I did that by my scores. I placed them all three on the list of qualified applicants.

Q. So you thought based on your score that Mr. Christy was the most qualified applicant?

political affiliation?

A. No, he told me he felt I was the best man for the job, but there was nothing he could do. His hands were tied, that Brady was the man with the power, Brady got all the jobs.

He was very specific about that.

Q. And besides what Mr. Boschi told you, do you have any other facts that indicate that Mr. Boschi took some conduct or adverse action based on your political affiliation?

A. No, I do not.

* * *

EXAMINATION

* * *

BY MR. HICKEY:

Q. Chuck, did you have a conversation with Jim Sperduti regarding information that Sean Pilecki had told him?

A. Yes.

Q. And what did Jim Sperduti tell you?

A. He told Jim that he had done what he had

to do.

Sean told Jim that he did what he had to do and that I wasn't too far off on the Morris name, but, in fact, there were several politicians his dad got a hold of for Sean to get that job, and that he hoped there were no hard feelings.

Q. Did you have any conversations with Lou Sperduti as to who he thought was the most qualified man to fill the paint crew foreman position?

A. Yes.

Q. What did Lou Sperduti tell you?

A. That he felt that if the two of us were compared, if it was Chuck against Sean, he would definitely pick Chuck, and he says that even today.

Q. When he recommended Sean for the position of paint crew foreman, based on your conversations with Lou Sperduti, was he aware that you were up for the position of paint crew foreman at the time he recommended Sean?

A. No, he was not. He said they were always comparing Randy with Sean, and that he

felt Randy was a bum and that he would not recommend Randall.

Q. Did you have any discussions with Mike Haney as to who he thought was the most qualified man for the paint crew foreman position?

A. Yes, I did.

Q. And what did Mike Haney tell you?

A. That he would recommend me for the job without a doubt, that I could do that job, and he doesn't see how they could ever choose Sean to do that job.

Q. Did he tell you whether he was ever contacted in connection with the filling of the paint crew foreman position?

A. No one ever asked him.

Q. Apart from Lou Sperduti's recommendation of Sean Pilecki, did anyone else within the Commission contact Lou Sperduti to get an evaluation or any information on your background?

A. No, they did not.

Q. Based on your conversations with Richard Rowland, did Richard Rowland ever tell you

July 27, 1993

Dear Chuck:

The purpose of this letter is to provide you with an affidavit setting forth my recollection of a conversation between you and John Boschi, which I heard on or about Wednesday, March 17, 1993. The conversation was as follows:

1. You asked John if there was a specific reason why you were not selected to be the paint crew foreman. John responded that you had an excellent record and that your record had nothing to do with why you were not selected.

2. You then asked John what you had to do to get a promotion. John told you that you or your father had to speak with Robert Brady because he is the one who gets the jobs.

3. You responded that you wanted to earn the position on your own merit and asked if this was the only way to be promoted. John stated that the promotion process was 99% political and that you have been around here long enough to know that.

4. You then asked how Shawn Pollecki received the promotion. John responded that Shawn's father spoke to Senator Morris who talked to Brady and asked him to award the position to Shawn.

5. John suggested that your father should get in

touch with Senator Fumo and have him tell Brady to create an assistant foreman job at DeVault. John told you that they were going through this process at Plymouth right now and that he would have to give the assistant job to Charlie Jackson even though he did not want to. John then stated that he would then have to create a job for Spike to keep him happy. John told you that all he needed was a phone call from Brady and you would get the job.

6. You told John that you have nothing against Shawn but 17 years of service should count for something. John responded that although you were the best man for the job he could not help you.

The foregoing statements are true and correct to the best of my knowledge, information and belief.

Very truly yours,

Jim Sperduti

Q. Yes.

A. He helped to develop it, yes, he did.

Q. Did Chuck ever have a mechanic's helper report to him?

A. Yes.

Q. And what would Chuck's responsibilities vis-a-vis a mechanic's helper be?

A. Advise him as to what he had to do during the course of the day and sometimes how to do it.

Q. Did he supervise the mechanics' helpers?

A. I would say he was supervising them, yes.

Q. As part of Chuck's responsibilities, was he responsible for keeping administrative records?

A. Yes, they have a lot of records to keep, the mechanics do.

Q. And what type of records would he keep?

A. Maintenance, what they done to the vehicles, signing out parts, they used to order parts, too, in fact, they still do.

Q. Did Chuck keep accurate files and records?

A.. To the best of my knowledge, yes.

Q. In the preventative maintenance and repair area, was Chuck a good mechanic?

A. Yes, he was.

Q. Did he have the ability to maintain the paint equipment?

A. He helped us out a lot of times, yes.

Q. Did he have any special knowledge concerning various other pieces of equipment that the Commission utilizes?

A. Yes, message boards, the barrier machine and computerized spreaders and everything we had really up there.

Q. Does Chuck possess the ability to repair virtually all of your equipment?

A. Yes, he has to be.

Q. Does Chuck interact well with the public?

A. As far as I know. Since I've been there he has, yes.

Q. Does he interact well with his fellow employees?

A. Yes.

Q. Is he willing to work overtime, if needed?

A. Oh, yes.

Q. What about Chuck's safety experience?

MR. BAYLSON: I object to the form of the question.

THE WITNESS: Safety in his every day work habits?

BY MR. HICKEY:

Q. Yes.

A. He was a pretty safe guy to work with.

Q. Does Chuck know CPR?

A. Yes, he does. He had to know when he was the first responder.

Q. When the position paint crew foreman first came up, I understand that George Pilecki contacted you.

A. Yes.

Q. He contacted you more than once.

A. Yes, he did.

Q. In fact he spoke with you frequently.

A. Yes, he did.

Q. He spoke to you about his son, Sean.

A. I was on the paint machine. That's all I can say.

Q. I have another document that I'd like you to take a look at and we'll call it L.

Sperduti-2. It's a memorandum to the director of human resources from John Boschi.

(Exhibit number L. Sperduti-2 was marked for identification.)

BY MR. HICKEY:

Q. In the exhibit Boschi informs the director of human resources that Sean is supervising line painting operations in the absence of a foreman during the past three years; is that a correct statement?

A. Not to the full extent, no. Like I said a while ago, I answered your questions about it, he was like, he used to help me out but as far as direct supervision, no. If I was gone for any length of time they used to send Al Greco out there.

Q. And you testified that he acted as an administrator in your absence?

A. Yes, like I said, he used to look after things for me and bring back the results to

me, because I had to make up that daily report.

Q. But he wasn't the foreman?

A. No, he wasn't the foreman, no.

Q. Did Sean ask you for a recommendation?

A. Yes, he did.

Q. And who did you give that recommendation to?

A. I didn't write anything on paper. I told John Boschi about it.

Q. And what did you tell Mr. Boschi?

A. I told him that I would recommend Sean for the paint machine foreman.

Q. Did you tell him why?

A. Out of the four on the paint machine, I'd say he was the best one, yes.

Q. You based your recommendation on the fact that he was the best one out of the four individuals on the paint crew?

A. That's right.

Q. And at the time you gave the recommendation, were you aware of who the other candidates were?

A. Not right at the first time but after a few days went by, I knew who part of them was but

politicians involved?

A. No, he might have but I'm not sure who it was.

Q. Didn't John Boschi tell you that Chuck Christy was the most qualified man for the paint crew foreman position?

A. Yes, he did.

Q. Didn't John Boschi tell you that Chuck was not given the paint crew foreman position due to political influence exerted by George Pilecki?

MR. BAYLSON: I object to the form of the question.

THE WITNESS: I'm not sure how he said it, about whether it was due to George Pilecki, but he said that it was political, politics involved.

BY MR. HICKEY:

Q. And he told you that it was because of the politics that Chuck didn't get the position?

A. Well, he didn't say it that way. He said Sean would probably get the job on account of the political push.

Q. Did you discuss the politics behind the promotion of Sean Pilecki with Vince Greco?

Supreme Court, U.S.
FILED
OCT 6 1995
OFFICE OF THE CLERK

NO. 95-336

In The
Supreme Court of The United States
October Term 1995

PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN STEWART and VINCENT GRECO

Petitioners

vs.

CHARLES CHRISTY ,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, VINCENT GRECO, AND JOHN STEWART

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THIS CASE IS NOT CONTROLLED BY *JOHNSON V. JONES*, SINCE THE ISSUE IS NOT WHETHER THE PETITIONERS MADE AN EMPLOYMENT DECISION ADVERSE TO RESPONDENT, BUT WHETHER THEY COULD REASONABLY HAVE BELIEVED THEIR ACTIONS REGARDING THE DECISION WERE CONSISTENT WITH CLEARLY ESTABLISHED LAW

The Respondent has failed to address the entire thrust of qualified immunity asserted in the first Question Presented. Instead, Respondent claims that the qualified immunity issue in this case is controlled by *Johnson v. Jones*, 115 S. Ct. 2151 (1995), and that the Third Circuit rejected Petitioner's qualified immunity claim on that basis. This is clearly wrong.

In *Johnson* the plaintiff alleged that he was beaten by police, and the defendants asserted qualified immunity, claiming, in effect, "No, we were not the ones who beat you." *See id.* at 2153. This Court held that the defendants' denial was not a qualified immunity claim that could be immediately appealed under the collateral order doctrine.

In this case, the Respondent claims that the defendants failed to promote him for political reasons. The Petitioners are not claiming, "No, we were not the ones who failed to promote Christy," like the defense in *Johnson*. Instead, Petitioners are claiming, "Yes, we did fail to promote Christy, but those of us involved did it for proper legal reasons, not political reasons."

The Third Circuit recognized that the facts regarding the process that resulted in the failure to promote Christy were not in dispute, and summarized those facts in its opinion. *Christy v. Pennsylvania Turnpike Commission*, 54 F.3d 1140, 1143 (3d Cir. 1995) (App. 25a). The Third Circuit specifically rejected

Respondent's claim that it lacked a jurisdiction to consider the qualified immunity appeal under the collateral order doctrine:

> The plaintiff contends that we lack jurisdiction to entertain this argument because the District Court's decision was based on factual rather than legal grounds. We do not agree.

Id. at 1143 n.4 (App. 27a). The Third Circuit rejected Respondent's position on this issue, and no review of that rejection has been sought by Respondent. While Respondent fixes on the collateral order doctrine, he fails to even address the substance of the qualified immunity issue raised in the Petition. Respondent does not dispute that the second prong of qualified immunity as applied by this Court was ignored by the Third Circuit and the District Court below. Respondent does not dispute that the analysis of qualified immunity applied by the Court below is inconsistent with the analysis applied by this Court. Respondent does not dispute the deep division among the circuits as to the appropriate analysis for qualified immunity.

Meanwhile, qualified immunity is being applied at the circuit court level at a pace of almost a decision a day. Since the Petition was filed before this Court on August 25, 1995, 30 new opinions have been filed by circuit courts applying qualified immunity. *See Gunaca v. State of Texas*, ___ F.3d ___, 1995 WL 550519 (5th Cir. Oct. 3, 1995); *Seltzer-Bey v. Delo*, ___ F.3d ___, 1995 WL 574248 (8th Cir. Oct. 2, 1995); *Camp v. Gregory*, ___ F.3d ___, 1995 WL 576951 (7th Cir. Oct. 2, 1995); *Williamson v. Mills*, ___ F.3d ___, 1995 WL 539689 (11th Cir. Sept. 27, 1995); *Blissett v. Coughlin*, ___ F.3d ___, 1995 WL 566108 (2d Cir. Sept. 25, 1995); *Moore v. Valder*, ____ F.3d ___, 1995 WL 557406 (D.C. Cir., Sept. 22, 1995); *Vaughn v. U.S. Small Business Administration*, ___ F.3d

___, 1995 WL 555454 (6th Cir., Sept. 21, 1995); *Sindoni v. Young*, ___ F.3d ___, Unpublished Disposition, 1995 WL 555554 (4th Cir., Sept. 20, 1995); *Price v. Sasser*, ___ F.3d ___, 1995 WL 551271 (4th Cir., Sept. 19, 1995); *Barnette v. Folmar*, ___ F.3d ___, 1995 WL 514541 (11th Cir., Sept. 15, 1995); *Rodriguez v. Phillips*, ___ F.3d ___, 1995 WL 555564 (2d Cir., Sept. 13, 1995); *Duffie v. Edwards*, ___ F.3d ___, Unpublished Disposition, 1995 WL 542352 (4th Cir., Sept. 13, 1995); *Hervey v. Coral Estes*, ___ F.3d ___, 1995 WL 535026 (9th Cir., Sept. 12, 1995); *Buonocore v. Harris*, ___ F.3d ___, 1995 WL 536657 (4th Cir., Sept. 12, 1995); *Lennon v. Miller*, ___ F.3d ___, 1995 WL 540409 (9th Cir., Sept. 11, 1995); *Newell v. Sauser*, 1995 WL 530235 (9th Cir., Sept. 11, 1995); *Komlosi v. New York State Office of Mental Retardation and Developmental Disabilities*, ___ F.3d ___, 1995 WL 527830 (2d Cir., Sept. 7, 1995); *Willbanks v. Woodrow*, ___ F.3d ___, Unpublished Disposition, 1995 WL 519157 (10th Cir., Sept. 1, 1995); *Melek v. Kohler*, ___ F.3d ___, Unpublished Disposition, 1995 WL 520037 (9th Cir., Sept. 1, 1995); *Smith v. Myers*, ___ F.3d ___, Unpublished Disposition, 1995 WL 521158 (6th Cir. Sept. 1, 1995); *Colvin v. McDougall*, 62 F.3d 1316 (11th Cir. 1995); *White v. Harmon*, ___ F.3d ___, Unpublished Disposition, 1995 WL 518865 (6th Cir., Aug. 31, 1995); *Uhlrig v. Harder*, ___ F.3d ___, 1995 WL 510682 (10th Cir., Aug. 30, 1995); *Williams v. Bass*, ___ F.3d ___, 1995 WL 507309 (6th Cir., Aug. 29, 1995); *Alexander v. County of Los Angeles*, ___ F.3d ___, 1995 WL 507449 (9th Cir., Aug. 29, 1995); *Adams v. Poag*, 61 F.3d 1537 (11th Cir. 1995); *Neice v. Sawyer*, ___ F.3d ___, Unpublished Disposition, 1995 WL 510022 (6th Cir. Aug. 28, 1995); *Kincade v. City of Blue Springs, Missouri*, ___ F.2d ___, 1995 WL 502857 (8th Cir., Aug. 25, 1995); *Sizemore v. Aliff*, ___ F.3d ___, Unpublished Disposition, 1995 WL 502912 (4th Cir., Aug. 25, 1995); *Tamez v. City of San Marcos, Texas*, 62 F.3d 123 (5th Cir. 1995).

Circuit courts continue to resolve this issue using inconsistent tests, providing governmental officials with confusing and conflicting precedent and no clear consistent guidance as to what behavior will be protected by qualified immunity. This is an issue that cries out for clarification by this Court.

RESPONDENT HAS NOT ADDRESSED PETITIONERS' PRIMARY ELEVENTH AMENDMENT ARGUMENT, THAT THE CASE SHOULD BE REMANDED TO ALLOW THE PETITIONER TO CREATE A FACTUAL RECORD

Respondent's discussion of the second issue, concerning the reversible error in not remanding the issue of Eleventh Amendment immunity pursuant to *Hess v. Port Authority Trans-Hudson Corporation*, 115 S. Ct. 394 (1994), for development of a factual record, completely misses the petitioners' argument. This Court in the *Hess* case stressed the significance of the factual record developed in that case. *Id.* at 402-05. In this case, however, the record shows that neither the Respondent nor the Petitioners made any attempt to make a factual record on the issue of Eleventh Amendment immunity. Petitioner Pennsylvania Turnpike Commission asserted that it was entitled to Eleventh Amendment immunity as a matter of law in connection with making a Motion for Summary Judgment. Respondent never asserted that there were any genuine issues of material fact. Respondent's Brief fails to refute the Commission's primary argument, that the Commission, having moved for summary judgment, never had any reason to develop a factual record. Respondent's brief completely ignores this crucial fact, which warrants reversal and remand for development of a factual record.

CONCLUSION

For the reasons stated herein, and in the Petition for Writ of Certiorari, it is respectfully requested that certiorari be granted in this case.

Respectfully submitted,

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September 29, 1995

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